

**REDACTIONS MADE BY THE
DEPARTMENT OF HOMELAND
SECURITY**

**DHS Implementation of
Executive Order #13769
“Protecting the Nation
From Foreign Terrorist
Entry Into the United
States”
(January 27, 2017)**





DHS OIG HIGHLIGHTS

DHS Implementation of Executive Order #13769 “Protecting the Nation From Foreign Terrorist Entry Into the United States” (January 27, 2017)

January 18, 2018

Why We Did This Report

Following news reports that U.S. Customs and Border Protection (CBP) personnel implementing Executive Order #13769 (EO) “*Protecting the Nation from Foreign Terrorist Entry into the United States*” (January 27, 2017) potentially violated the civil rights of individual travelers, we received a congressional request to investigate DHS’s implementation of the EO. In response, we investigated how DHS and CBP, the DHS entity primarily responsible for implementation of the EO, responded to challenges presented by the EO, including the consequence of court orders and CBP’s compliance with them.

What We Recommend

This report contains no recommendations.

For Further Information:

Contact our Office of Public Affairs at (202) 254-4100, or email us at DHS-OIG.OfficePublicAffairs@oig.dhs.gov

What We Found

In our investigation, we found that CBP was caught by surprise when the President issued the EO on January 27, 2017. DHS had little opportunity to prepare for and respond to basic questions about which categories of travelers were affected by the EO. We found that the bulk of travelers affected by the EO who arrived in the United States, particularly LPRs, received national interest waivers. In addition, we observed that the lack of a public or congressional relations strategy significantly hampered CBP and harmed its public image. While the media reported instances of misconduct, we did not substantiate any claims of misconduct on the part of CBP Officers (CBPOs) at the ports of entry. Regarding the Department’s compliance with multiple federal court orders that were issued between the January 27, 2017 release of the EO and the February 3, 2017 nation-wide injunction in *Washington v. Trump*, we found that at the ports of entry, CBP largely complied with court orders, albeit with some delay and confusion as to the scope of some orders. But while CBP complied with court orders at U.S. ports of entry as to travelers who had already arrived, CBP was aggressive in preventing affected travelers from boarding aircraft bound for the United States. We believe those actions violated two separate court orders that enjoined CBP from this activity.

DHS and CBP Response

Appendix D provides a copy of DHS’s response to our report. DHS disagreed with our finding that CBP’s actions violated two separate court orders.



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Department of Homeland Security

Washington, DC 20528 / www.oig.dhs.gov

January 18, 2018

MEMORANDUM FOR: The Honorable Kirstjen Nielsen
Secretary
Department of Homeland Security

Kevin McAleenan
Acting Commissioner
U.S. Customs and Border Protection

FROM: John V. Kelly 
Acting Inspector General

SUBJECT: *DHS Implementation of Executive Order #13769
"Protecting the Nation From Foreign Terrorist
Entry Into the United States" (January 27, 2017)*

I am attaching our final report, *DHS Implementation of Executive Order #13769 "Protecting the Nation from Foreign Terrorist Entry into the United States" (January 27, 2017)*. This report was prepared under the *Inspector General Act of 1978*, as amended, and, more specifically, Section 2(3), "to provide a means for keeping the head of the establishment and the Congress fully and currently informed about problems and deficiencies relating to the administration of [Departmental] programs and operations and the necessity for and progress of corrective action."

As you know, we provided our final draft report to the Department on October 6, 2017 for review and comment. We received the Department's formal comments and redactions on January 12, 2018 — over three months later. The Department's redactions did not contain any specific references to asserted privileges.

In its Management Response, DHS disagreed with our conclusion that CBP's actions in preventing affected travelers from boarding aircraft bound for the United States appeared to violate two separate court orders that enjoined them from this activity. We considered the Management



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Response, but our conclusions remain unchanged, as further explained in our response to DHS's comments.

Consistent with our responsibility under the *Inspector General Act*, we will provide copies of the redacted report to congressional committees with oversight and appropriation responsibility over the Department of Homeland Security. We will post the redacted report on our website for public dissemination.

Attachment



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The Office of Inspector General has not claimed any withholdings with respect to information contained in this report. All redactions in the enclosed report were made by the Department of Homeland Security pursuant to Exemptions 5, 6 and 7(C) of the Freedom of Information Act, 5 U.S.C. § 552 (FOIA).

FOIA Exemption 5 protects “inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency.” 5 U.S.C. § 552(b)(5). The Department is invoking the deliberative process, attorney work product, and attorney client privileges of Exemption 5 to protect information that falls within that privilege’s domain.

FOIA Exemption 6 protects “personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.” 5 U.S.C. § 552(b)(6)(emphasis added).

Exemption 7(C) protects from public disclosure “records or information compiled for law enforcement purposes . . . [if disclosure] could reasonably be expected to cause an unwarranted invasion of personal privacy.” 5 U.S.C. § 552(b)(7)(C).



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I. Overview

At 4:43 p.m.¹ on Friday, January 27, 2017, the President issued an Executive Order (EO) that, among other actions:

- immediately suspended entry into the United States of immigrant and non-immigrant aliens from Iran, Iraq, Libya, Somalia, Sudan, Syria, and Yemen² for a period of 90 days [Section 3(c)], with exceptions “on a case-by-case basis ... in the national interest” [Section 3(g)];
- immediately suspended the U.S. Refugee Admissions Program (USRAP) for 120 days [Section 5(a)], with exceptions for religious minorities and in the national interest [Section 5(e)]; and
- indefinitely banned the entry of refugees from Syria [Section 5(c)].³

This report examines how DHS, and U.S. Customs and Border Protection (CBP) in particular, responded in real time to a number of quickly-emerging challenges that the EO posed, including:

- The legal scope of the EO, including whether the order covered lawful permanent residents (LPRs) (green card holders) from the seven countries,⁴ many of whom may have resided in the United States for years, have U.S. citizen family members, or could have service records as members of the U.S. military;

¹ Throughout this report, times are in U.S. Eastern Standard Time unless otherwise indicated.

² The EO did not apply to “foreign nationals traveling on diplomatic visas, North Atlantic Treaty Organization visas, C-2 visas for travel to the United States, and G-1, G-2, G-3, and G-4 visas).

³ Executive Order #13769 “Protecting the Nation from Foreign Terrorist Entry into the United States” (Jan. 27, 2017).

⁴ Throughout this report, we refer to Iran, Iraq, Libya, Somalia, Sudan, Syria, and Yemen as “the seven countries.” The EO suspended the entry into the United States of “aliens from countries referred to in section 217(a)(12) of the [Immigration and Nationality Act (INA)], 8 U.S.C. 1187(a)(12).” This section of the INA refers to nationals of Iraq and Syria, and nationals of other countries which the Secretary of Homeland Security, in consultation with the Secretary of State and the Director of National Intelligence, has designated “countries or areas of concern.” As of January 27, 2017, Iran, Libya, Somalia, and Sudan had also been designated “countries of concern.” *See also* Visa Waiver Program Improvement and Terrorist Travel Prevention Act of 2015, Pub. L. 114-113, Division O, Title II, Sec. 203; <https://www.dhs.gov/news/2016/02/18/dhs-announces-further-travel-restrictions-visa-waiver-program>.



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- How holders of immigrant and non-immigrant visas were affected, with focus on holders of special immigrant visas from Iraq;
- How refugees were affected;
- How implementing guidance was developed, then distributed to the CBP rank-and-file at ports of entry;
- How the delegation of authority to grant exemptions or waivers⁵ from the EO evolved over time, and its results;
- The consequence of court orders and the extent of CBP's compliance with them;
- The experiences of travelers and how CBP responded to humanitarian concerns; and
- How DHS and CBP communicated with the media and Members of Congress as the media storm threatened, then raged.

This report focuses on the experience of DHS and affected travelers arriving in the United States, from the signing of the EO on January 27 through February 3 when, in *Washington v. Trump*, the U.S. District Court for the Western District of Washington issued a temporary restraining order (TRO) that halted the government's enforcement of the EO nationwide. We also touch on the experience of travelers who were refused admission at preclearance facilities outside the United States and travelers who were denied boarding by air carriers overseas. Some of the latter group eventually obtained boarding rights and gained admission to the United States, either because of court orders or pending litigation and the threat of additional court decisions.

To prepare this report we obtained email correspondence and documents from DHS headquarters, as well as from the relevant DHS components: CBP, U.S. Immigration and Customs Enforcement (ICE), U.S. Citizenship and Immigration Services (USCIS), and the DHS Office of Intelligence and Analysis. CBP provided the lion's share of documents and data. These materials included data compilations from several CBP databases concerning affected travelers at each domestic port of entry and preclearance facility. From the data, we established the number of waivers, or other actions that determined whether affected travelers would be admitted (or denied entry) to the United States. In addition, we reviewed relevant court orders and court filings, as well as media

⁵ The source documents refer variously to "exemptions," "waivers" and "exceptions" to the EO under Sections 3(g) and 5(e). We use the terms exemptions or waivers interchangeably, to mean the same thing: the admission into the United States of a person who would otherwise be excluded from entry under the EO.



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coverage. We interviewed numerous DHS and component officials, the CBP Officers (CBPOs) tasked with implementing the order, and numerous travelers. Ultimately, we interviewed over 160 individuals and reviewed over 48,000 documents. Given the fast moving circumstances under which DHS and CBP worked to develop EO implementation guidance, many policy decisions unfolded partly on conference calls, for which written records do not exist. Thus, this report cannot capture the full extent of the discussions between DHS and its interagency partners.

We do not opine on the legality of the EO, or the merits of the various court orders and legal actions that ensued. Rather, our focus was on the manner in which DHS and CBP executed the EO and the extent of compliance with court orders. We conducted the investigation and prepared this report under the authority of the Inspector General Act of 1978, as amended.⁶

II. Summary of Conclusions

DHS was largely caught by surprise by the signing of the EO and its requirement for immediate implementation. The Secretary of Homeland Security had seen two draft versions of the order, one on Tuesday and a revised draft on Thursday — the day before the order issued. But other than through media reports and a short email summary a few days before its signing, the main implementer of the EO's provisions — CBP — had practically no advance notice that the order would issue, or that it would be effective upon signature. Nor did it know exactly what the EO would contain.

DHS and its components had no opportunity to provide expert input in drafting the EO. Answers to critical questions necessary for implementation were undefined when the EO issued. No policies, procedures, and guidance to the field were developed. Nevertheless, the EO took effect immediately, while travelers from the affected countries were in the air and thousands more were preparing to travel. The lack of clarity regarding critical issues required DHS and its interagency partners DOJ and the State Department (State) to improvise policies and procedures in real time.

⁶ Section 2(2) of the Inspector General Act of 1978, as amended, states that the purpose of the Act is to "provide leadership and coordination and recommend policies for activities designed (A) to promote economy, efficiency, and effectiveness in the administration of and (B) to prevent and detect fraud and abuse in, such programs and operations."



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We found that the lack of opportunity to plan for the EO led to the failure of DHS and CBP to implement an effective public affairs strategy in the early days of the EO. The lack of a media strategy — such as designating effective points of contact, issuing media guidance, and timely issuing official statements and answers to frequently asked questions — contributed to an impression of stonewalling and a perception of non-compliance with court orders even where that was not the case.

On Friday and Saturday, CBP aggressively applied the EO to block the entry of non-LPR travelers affected by the EO. However, late Saturday night, a federal court in New York in the case of *Darweesh v. Trump*, issued a nationwide order staying the removal of aliens subject to the EO. Within 90 minutes of the *Darweesh* order, CBP had issued nationwide guidance to the field in an attempt to comply with the order.

Although there were some delays in the receipt and transmission of court orders and accompanying guidance, we found that overall, CBP headquarters issued implementing guidance relatively quickly. As such, after the *Darweesh* order, we did not find significant variation in application of the EO across ports of entry nationally.

However, we do have serious reservations about CBP's compliance with *Darweesh* and two other court orders as they pertained to CBP's international operations. By preventing individuals subject to the EO from reaching the United States, through various methods, CBP effectively circumvented provisions of these orders. After *Darweesh*, a federal court in Boston issued an order on Sunday, January 29. In that order, the court instructed CBP to notify airlines with flights bound for Boston that provisions of the EO were stayed. CBP complied, yet issued instructions to the airlines not to board passengers bound for Boston. On Tuesday, January 31, a federal court in Los Angeles, even more broadly instructed CBP not to block the entry of EO-affected travelers bound for the United States. Nevertheless, CBP continued to issue "no board" instructions and threatened fines to airlines that boarded EO-affected travelers on flights bound for the United States. Those actions —which had the same effect as denying the affected travelers entrance at ports of entry, an act prohibited by the court orders —are troubling.

From the information at our disposal, it appears that CBP's interviews of EO-affected travelers in secondary inspection (used to determine eligibility for a



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waiver from the EO) relied on standard procedures for questioning travelers to ascertain risk. Under these procedures, CBPOs asked questions concerning the “five Ws” (who, what, where, when, why) about the traveler and his or her purpose of travel. Reported interview times varied in duration from as little as ten minutes to up to an hour — although records do not reflect whether this was inclusive of waiting times. At least one CBPO said he was frustrated with the vetting as implemented because of the language barriers between CBPOs and travelers and because it simply amounted to another hurdle for people to get into the United States. In our review, we did not identify any evidence that CBP detected any traveler linked to terrorism based solely on the additional procedures required by the EO.

Although the court orders functionally required CBP to stop removing EO-affected travelers solely on the basis of the EO, CBP continued to refer practically all such travelers to secondary inspection. That policy led to large numbers of travelers being processed and detained for additional, and significant, periods of time.⁷ Most EO-affected travelers who reached U.S. ports of entry were granted national interest waivers under Section 3(g) of the EO, and were admitted to the United States. Of the total 1,976 individual travelers that CBP processed under the EO,⁸ 90% (1,784) of them were admitted to the United States. Under the EO, 179 travelers (9%) were refused entry to the United States. Of this group, 178 withdrew their applications for admission and one was a crewmember detained on board a ship.⁹

We reviewed public allegations of unprofessional conduct on the part of CBPOs,

⁷ DHS and CBP contend that “referral to secondary was functionally necessary” in order to grant national interest waivers. We note, however, that the EO itself only required “case-by-case” adjudication of waivers. We do not substitute our judgment for DHS and CBP’s policy decision. We simply describe the consequences.

⁸ Throughout this report, in referring to “EO-affected travelers,” we mean travelers whose processing, admission, or denial of admission into the United States was based on the EO. Largely in agreement with CBP’s classifications, our data and analysis excluded travelers from the seven countries who were denied admission under INA section 212(a) on grounds unrelated to the EO (such as persons barred on health grounds; persons with criminal conviction(s); or persons barred from entry under a previous order of expedited removal). During a final review of our report, CBP took the position that no processing or admission was based on the EO; therefore, in its view, our data methodology could not be validated. For further discussion, see Appendix C.

⁹ The crewmember possessed a D1 visa, a type of nonimmigrant visa that allows persons who work on sea vessels or international airlines that operate in the United States to visit the United States for up to 29 days in connection with the ship or airline’s normal operations.



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including about the purported misuse of restraints and lengthy detentions of travelers without giving them access to food, water, and restrooms. Some media outlets and immigrants' rights attorneys amplified travelers' contentions of abuse and mistreatment by CBPOs. Certain stories gained traction concerning CBPOs' purported use of restraints, even on minor children, and lengthy detention of travelers without providing access to toilets, food, and water. Based on the information available to us when we drafted this report, we did not substantiate allegations of unprofessional conduct, although one incident is still under investigation. In general, with some exceptions, travelers told us that CBPOs behaved in a professional and humane manner, even in stressful situations. We concluded that differences in treatment, such as the use of restraints and conditions of detention, appear to have resulted from fact-specific circumstances, such as the relative capacity of certain ports of entry to hold travelers overnight, or whether travelers had to be transported. We also found that some reported allegations were simply untrue.

III. Preparations and Premonitions: Before the EO

The bulk of this report provides a narrative of the most significant facts discovered during our investigation, arranged in generally chronological order.

A. Advance Knowledge of EO at DHS Headquarters

DHS Secretary John Kelly told OIG investigators that he believed he saw a draft of the EO and discussed it with both his Chief of Staff and Gene Hamilton, a transition team official, on Tuesday, January 24, four days after the inauguration. On Thursday, January 26, the day before the order issued, Hamilton shared a revised draft with the Secretary. The Secretary stated that he knew that the order was going to be promulgated. The Secretary understood that DOJ's Office of Legal Counsel (OLC) and the White House Counsel had (b) (5) vetted the draft EO for compliance with the law, and that DHS had played a role in drafting it. Secretary Kelly told us he had assumed that White House staff had proactively engaged Congress and other stakeholders in advance of the EO's signing.

For his part, Hamilton told OIG investigators that he did not see the final EO until after it was signed. (b) (5)

(b) (5) Nevertheless, Hamilton stated that based on an earlier draft, he was able to brief DHS leadership on the EO on Friday afternoon, about an hour after the EO signing ceremony at



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4:43 p.m. Hamilton circulated the final version of the EO to the CBP, ICE and USCIS leadership at 6:32 p.m.

Joseph Maher, the Acting General Counsel for DHS, told OIG investigators that he lacked specific knowledge of the EO (but did know generally that an EO was coming) until he saw a draft about an hour before it was signed. (b) (5)

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Maher understood that the draft EO under review here was a (b) (5)

(b) (5)

he and his staff lacked the opportunity to review the EO in advance or to provide guidance on its implementation. Maher had understood, however, that DOJ OLC had vetted it, and when he looked at the draft, he believed a deep knowledge of immigration law had informed it. DHS took the position that a presidential order cleared by DOJ OLC was a fully binding, legal order that must be enforced, absent a court order invalidating it in whole or in part. We note that DOJ OLC's memorandum approving the EO, dated January 27, 2017, was limited to the following analysis: "[t]he proposed Order is approved with respect to form and legality." This memorandum did not analyze the due process rights of LPRs, the interests of SIV holders, or other issues with which DHS, and the courts, would grapple throughout the week. The dearth of analysis and informal nature of the EO memorandum can be distinguished from letter and memorandum opinions on DOJ OLC's website, which provide a legal opinion and detailed legal analysis in response to a question of law.

Other than Secretary Kelly and Acting General Counsel Maher, we did not identify anyone at DHS headquarters who saw a draft of the EO before its issuance. It does not appear that DHS headquarters forwarded or otherwise circulated the draft EO to anyone in CBP.

¹⁰ Executive Order "Enhancing Public Safety in the Interior of the United States" and Executive Order "Border Security and Immigration Enforcement Improvements."



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B. Media Reports Further Disclose Details of Draft EO

Media reports on the forthcoming EO began to appear on Tuesday, January 24. DHS daily media summaries captured the reporting in various degrees of detail. Employees throughout DHS and external stakeholders received the summaries, which compiled multiple news reports on the draft EO. For instance, the Wednesday morning edition of “The Homeland Security News Briefing,” an internal DHS news summary service, detailed specifics of the draft EO from January 24 news reports, including that the President would sign an EO that would “include at least a four month halt on all refugee admissions, as well as a temporary ban on people coming from some Muslim-majority countries.” On Wednesday morning, *Reuters* carried one of the earliest detailed articles on the draft EO, stating that according to “congressional aides and immigration experts briefed on the matter,” the order would “include a temporary ban on most refugees and a suspension of visas for citizens of Syria and six other Middle Eastern and African countries.”¹¹

On Wednesday evening, *Vox* published a White House “action memorandum” to the President, dated January 23, and an accompanying draft of the EO.¹² The draft EO that *Vox* published differed in several respects from the final, signed EO. For instance, the January 23 draft contained 12 sections (versus 11 sections in the final order), including a thirty day ban on entry of aliens from seven countries (versus 90 days in the final order). The January 23 draft also contained some provisions that remained unchanged in the final EO. For example, the draft and final EOs suspended the USRAP for 120 days (Section 5(a) in both the *Vox* draft and the final EO) and indefinitely suspended the entry of Syrian refugees (Section 5(c) in both documents). Other publications also published copies of the draft on-line.¹³

¹¹ J. E. Ainsley, “Trump expected to order temporary ban on refugees,” *Reuters* (Jan. 25, 2017, 7:59 a.m.) at <http://www.reuters.com/article/us-USA-trump-immigration-exclusive-idUSKBN1582XQ>.

¹² M. Yglesias & D. Lind, “Read leaked drafts of 4 White House executive orders on Muslim ban, end to DREAMer program, and more,” *Vox* (Jan. 25, 2017, 5:43 p.m.), <https://www.vox.com/policy-and-politics/2017/1/25/14390106/leaked-drafts-trump-immigrants-executive-order>.

¹³ Cristiano Lima, “Trump says immigration block ‘not the Muslim ban’” *Politico* (Jan. 25, 2017) at <http://www.politico.com/story/2017/01/trump-immigration-block-muslim-ban-234205> (posted at 11:22 p.m.); J. Hirschfeld Davis, “Trump Orders Mexican Border Wall to Be Built www.oig.dhs.gov



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C. Draft Copies Informally Circulated to USCIS on Wednesday, January 25

A draft of the EO circulated via email from DOJ to USCIS attorneys on Wednesday, January 25. (b) (5)

(b) (5) Based on the draft, (b) (5)

(b) (5) officials at USCIS decided to suspend “circuit rides.” These are on-site interviews of refugees for potential participation in the USRAP, which were scheduled to take place beginning January 25. Notwithstanding that the EO was still in draft form and the informal nature in which USCIS officials received it, it appears that these officials regarded the draft EO as sufficiently legitimate to justify immediate action affecting many government travelers and refugees.¹⁴ *Reuters*, the *Associated Press*, and *The Hill* all reported on USCIS’s suspension of the circuit rides on January 26, as captured in “The Homeland Security News Briefing” the following morning. It does not appear that USCIS officials forwarded or otherwise circulated the draft EO to anyone in CBP.

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D. CBP Receives Brief Email Summaries on January 24-25

On Tuesday, January 24, a senior advisor at CBP headquarters emailed Acting Commissioner Kevin McAleenan a brief summary of what might happen on Wednesday, (b) (5) when the President was expected to sign certain executive orders related to homeland security. According to the senior advisor’s summary, (b) (5)

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and Plans to Block Syrian Refugees,” *New York Times* (Jan. 25, 2017) at <https://www.nytimes.com/2017/01/25/us/politics/refugees-immigrants-wall-trump.html>; D. Boyer, “Trump executive order to stem refugees from ‘terror –prone regions,” *The Washington Times* (Jan. 25, 2017) at <http://www.washingtontimes.com/news/2017/jan/25/trump-order-stem-refugees-terror-prone-regions/>.

¹⁴ A review of this draft EO circulated to USCIS reveals that (b) (5)

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On Wednesday, January 25, Acting Commissioner McAleenan received a slightly more detailed summary of the EO from several congressional staffers. One iteration of the summary reached McAleenan after a congressional staffer forwarded it to Chip Fulghum, who was then serving in three roles: as Acting Deputy Secretary of Homeland Security; Acting Under-Secretary for Management; and Deputy Under Secretary for Management. After providing an overview of the two orders to be signed on Wednesday, the staffer summarized in bullet points a third order concerning “National Security,” potentially to be signed on Thursday, January 26, which (in the words of the staffer):

- “Suspends visa issuance to countries where adequate screening cannot occur
- Suspends the refugee program for 120 days to determine which nationalities pose the least risk
- Suspends immigrant and nonimmigrant entry for countries of particular concern for 30 days
- Requires review of what information is necessary to safely issue visas to these countries
- Suspends visas to nationals of countries that don't provide the information necessary to adjudicate the visas
- Possible exceptions: diplomats, NATO and C-2 visas for travel to the UN
- Establishes requirements for “extreme vetting” (the requirements seem similar to what is currently done by the USCIS Fraud Detection and National Security unit)
- Prioritizes refugees whose claims are based on religious persecution or religious minority status
- Suspends indefinitely the Syrian refugee program and all visa issuance to Syrians
- Limits refugee cap to 50,000 for FY17



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- Directs the State [Department] and DOD to create a plan for safe zones for Syrian refugees
- Expedites completion of an Entry-Exit system”

Thus, CBP leadership received the most complete summary of the parameters of a potential EO (b) (5) from DPP Congressional staffers who apparently were better informed about the parameters of the EO than CBP itself.

Acting Commissioner McAleenan forwarded the bullet point summary to CBP’s National Targeting Center (NTC) in the Office of Field Operations (OFO), which began to prepare an issue paper on the potential impact on CBP operations (b) (5) AWP (b) (5)¹⁵ As early as Wednesday morning, NTC had begun pulling data, which included a preliminary estimate of 222 nonimmigrant visa holders arriving daily from the seven affected countries.

The NTC distributed a draft of the issue paper on Thursday, January 26. The issue paper (b) (5) (b) (5) AWP

(b) (5) A/C

¹⁵ The OFO is the largest component in CBP, charged with border security and facilitating trade and travel. See <https://www.cbp.gov/about/leadership-organization/executive-assistant-commissioners-offices>. Within the OFO, the NTC identifies people and products that pose potential threats to national security and prevent them from entering the United States. <https://www.cbp.gov/sites/default/files/assets/documents/2017-Mar/cbpaccessv3.3-021114.pdf>.



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(b) (5)

DPP

(b) (5)

For example, on Thursday afternoon, a representative of the EU Delegation to the U.S. emailed CBP asking to discuss “a draft executive order we have seen and which would/could bar the entry to the US of foreign nationals of 7 countries. In particular, we would like to know how CBP would implement this order when it comes to dual citizens (binationals) from the EU, who can’t since December 2015 apply to an ESTA¹⁶ but who are holding a valid US visa (or possibly a US green card or any other form of legitimate residence in the US).” This email was forwarded to several CBP officials before it reached CBP’s Deputy Executive Director (DED), Admissibility and Passenger Programs, who advised (b) (5)

(b) (5)

DPP

¹⁶ The Electronic System for Travel Authorization (ESTA) is an automated system that determines the eligibility of aliens to travel to the United States under the Visa Waiver Program (VWP). Under the VWP, eligible citizens or nationals of designated countries may travel to the United States for tourism or business for up to 90 days without a visa.

<https://www.cbp.gov/travel/international-visitors/frequently-asked-questions-about-visa-waiver-program-vwp-and-electronic-system-travel>.

www.oig.dhs.gov



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IV. The Long Weekend

The EO issued at the close of business on Friday, January 27. This would result in long work days through the weekend for some, and long detention hours for others.

A. Friday, January 27: EO Day

The President signed the EO at 4:43 p.m. on Friday afternoon. DHS component leadership received the final signed order at 6:32 p.m. Secretary Kelly was traveling at the time, so immediate responsibility fell on Acting Deputy Secretary Chip Fulghum to ensure its implementation. Once the EO was issued, Fulghum convened DHS senior leadership for a 6:00 p.m. conference call using the most expeditious forum he had: the Counterterrorism and Cyber Threat Advisory Board (CTAB).

According to meeting minutes, the CTAB call began with Fulghum stating that even though DHS did not have a copy of the signed EO, it was being interpreted as effective immediately. Fulghum also stated that the State Department was cancelling all applicable visas. Acting CBP Commissioner McAleenan stated that the EO would have an immediate impact on air and land travelers.

Fulghum directed CBP and DHS's Office of Operations Coordination to provide detailed reporting over the weekend and advised that additional weekend calls were likely.

By 5:22 p.m., the CBP's NTC had begun preparing for weekend operations on the EO. In order to prevent large numbers of EO-affected travelers from reaching the United States, NTC would have to flag the travelers in CBP computer systems and airlines would need to be engaged so that they could

Preclearance Facilities

CBP maintains preclearance facilities at 15 international airports in Canada, Ireland, the UAE, and other locations. At these facilities, CBP officers screen passengers and their luggage before they can board flights to the United States. Established by formal agreement between the United States and the host country, these facilities are part of CBP's "extended border strategy." Generally, CBP applies U.S. law on foreign territory in cooperation with the host nation.



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deny boarding. During normal operations (e.g., before the EO), a CBPO liaison in a foreign airport without a CBP pre-clearance facility (such as Zurich) would typically inform the airline of passengers CBP recommends not boarding, based on threat information from the NTC and other sources. Officers in the Regional Carrier Liaison Groups, Immigration Advisory Program (stationed at airports in Western Europe, Asia, and the Middle East), and Joint Security Program (posted in Mexico City and Panama City) would contact air carriers to recommend not boarding travelers.¹⁷ As it implemented the EO, CBP continued to follow its normal (pre-EO) procedures to identify U.S.-bound travelers who could pose a security risk. Under the EO, CBP would continue to use these tools, but now with the intention of identifying all EO-affected travelers in order to advise carriers to not allow them to board (or to directly block their travel at CBP's pre-clearance facilities abroad). Since many flights were already in the air when the EO was promulgated and guidance to the airlines was slow to issue, it took several days for this process to reduce the volume of travelers reaching the United States.

1. *Initial Guidance and Concern for Lawful Permanent Residents*

At 6:50 p.m., CBP's OFO advised all Directors of Field Operations (DFOs)¹⁸ and other field leadership that the President had just signed the EO and to "standby for guidance on immediate implementation." Seventeen minutes later, Gene Hamilton distributed to DHS headquarters "Official W[hite] H[ouse] talking points on EO." (b) (5)

AWP

By the time the official version of the EO reached DHS, its lawyers and experts (from headquarters, CBP, ICE, and USCIS) were already on a conference call working through a series of (b) (5) implementing questions (b) (5) that CBP's OFO posed. (b) (5)

AWP

¹⁸ Directors of Field Operations are typically Senior Executive Service (SES) officials with operational responsibility over multiple ports of entry in a given geographic area (e.g., the Baltimore Field Office Director oversees Dulles, Philadelphia, and Baltimore Washington International Airports).



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(b) (5)

AWP

Throughout Friday evening, Acting Commissioner McAleenan expressed (b) (5) in communications with DHS officials, including the heads of USCIS and ICE and Acting Deputy Secretary Fulghum. For instance, in an email to Acting USCIS Director Lori Scialabba and ICE Deputy Director Daniel Ragsdale, McAleenan wrote, (b) (5)

(b) (5)

The scope of the EO and its applicability (or not) to various categories of travelers, (b) (5) was a source of confusion for CBP and DHS leadership. (b) (5)

(b) (5)

(b) (5) at 8:05 p.m., CBP's lawyers received "initial guidance" under the EO, (b) (5)

(b) (5)

LPR – Green Card

A lawful permanent resident (LPR) has authorization to live and work in the United States, as evidenced by a permanent resident card ("green card"). Most LPRs are sponsored by family or employers in the U.S., although refugees and asylees may also become LPRs. LPRs generally have the same due process rights as citizens. A green card typically is valid for a period of 10 years and may be renewed. A conditional resident has a two year non-renewable green card with certain restrictions attached.

An immigration judge can adjudicate an LPR as removable under certain circumstances, such as finding the LPR committed certain crimes or left the U.S. for a lengthy period of time.



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A/C

- 1) (b) (5)
- 2)
- 3)
- 4)
- 5)

Refugees and Asylees

A **refugee** is a person outside his or her country of nationality who is unable or unwilling to return to his or her country of nationality because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.

An **asylee** is a person who meets the definition of refugee and is already present in the United States or is seeking admission at a port of entry. Refugees are required to apply for LPR status one year after being admitted, and asylees may apply for green card status one year after a grant of asylum.

DHS Expedited Procedures

Withdrawal / Voluntary Departure: by signing Form I-275, alien agrees to withdraw application for admission and to immediately depart, but can later attempt reentry without penalty.

Expedited Removal: Non-judicial alternative:

- DHS officers make summary adjudications
- Aliens can seek “credible fear” review for asylum status
- Appeal rights limited to credible fear or claim of lawful status in the U.S.
- Final Order of Removal results in reentry ban up to 5 years
- Criminal prosecution possible if aliens attempt to return early
- Applies to aliens designated by DHS Secretary in *Federal Register* (e.g., near border areas and in country less than 2 years)

(b) (5)

(b) (5)

¹⁹ Under the INA, certain classes of aliens without a valid visa can apply for advance parole. If granted, advance parole gives an alien permission to return to a U.S. port of entry and seek re-entry into the United States after traveling abroad. See 8 C.F.R. § 212.5(f). Advance parole is commonly granted for individuals who have a pending application for adjustment of status to that of an LPR. See 8 C.F.R. § 245.2(a)(4)(ii).

DPP



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(b) (5)

Around this time, and “[u]pon request of the U.S. Department of Homeland Security ...,” the State Department emailed CBP a one-page document provisionally revoking visas for all EO-affected travelers.²⁰

At 9:00 p.m., a conference call of DFOs (who typically oversee multiple regional ports of entry) and other OFO leadership took place to provide clarification and further guidance to the field. The chart at right captures the structure of CBP’s chain of command from headquarters to the field. The 9:00 p.m. call was widely attended. Two separate contemporaneous email summaries of the call recited directives that LPRs, returning refugees, returning



²⁰ Under 22 C.F.R. § 41.122(b)(2), “A consular officer, the Secretary, or any Department official to whom the Secretary has delegated this authority may provisionally revoke a nonimmigrant visa while considering information related to whether a visa holder is eligible for the visa.” Moreover, “A provisional revocation is subject to reversal through internal procedures established by the Department of State. Upon reversal of the revocation, the visa immediately resumes the validity provided for on its face. Provisional revocation shall have the same force and effect as any other visa revocation under INA 221(i), unless and until the revocation has been reversed. Neither the provisional revocation of a visa nor the reversal of a provisional revocation limits, in any way, the revocation authority provided for under INA 221(i), with respect to the particular visa or any other visa.” Cf. 22 C.F.R. § 42.82(b).



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asylees, and returning parolees were all to be referred to secondary inspection for a Tactical Terrorism Response Team (TTRT)²¹ interview, the results of which were to be sent to OCC for counsel and recommendations for waiver approval to the Acting Commissioner — with the exception of LPRs, who could be granted a waiver on the authority of the DFO. One of the summaries stated that, “[a]ny non-immigrant visa holders, first time immigrant visa holders, first time refugees currently enroute [sic] to U.S. or that arrive after today should be offered the opportunity to withdraw their applications for admission, if they refuse to withdraw then they should be processed as expedited removals.”

2. Exceptions / Waivers and Delegation of Authority

But delegating authority to DFOs to grant waivers would, in fact, take some time. Under Section 3(g) of the EO, the Secretaries of Homeland Security and State—not the DFOs— had the waiver/exception authority. The Secretary of Homeland Security, who was traveling, would need to delegate that authority downward to the Acting Commissioner of CBP. In turn, the Acting Commissioner would need to execute delegations to the DFOs, most of whom were members of the Senior Executive Service (SES). Moreover, for refugees, coordination would be required with Department of State counterparts to whom the Secretary of State would delegate waiver authority. Even though both departments were apparently working quickly on the delegations, they took time to draft, approve, and finalize.

3. Did the EO Cover LPRs? DHS Voices Additional Concerns About Scope

Acting Commissioner McAleenan and his team worked through Friday night and into Saturday morning, with increasing focus on what the EO would do to the affected LPRs already in the air and flying to the United States. Early that

²¹ See <https://www.dhs.gov/news/2017/05/03/written-testimony-cbp-ice-plcy-house-committee-homeland-security-task-force-denying> (TTRTs “are deployed at U.S. POEs and consist of CBP Officers who are specially trained in counterterrorism response. TTRT Officers utilize information derived from targeting and inspection to mitigate possible threats. TTRT officers are immersed in the current and developing threat picture through the continuous review of information, and are responsible for the examination of travelers identified within the Terrorist Screening Database, and other travelers suspected of having a nexus to terrorism who arrive to a POE.”)



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evening, McAleenan and others believed that LPRs were not within the scope of the EO. But when it became clear that the text of the EO likely included LPRs, McAleenan engaged in a series of email exchanges with Gene Hamilton to clarify the issue. In one email, McAleenan (b) (5) (b) (5) Hamilton responded that, as he understood the EO's language, it did indeed cover LPRs and that each person would require an individual exemption under Section 3(g) of the EO after a "revetting of sorts." McAleenan replied that he had operational concerns about the number of LPRs and others covered by the EO who were already in the air.

At 9:15 p.m., Secretary Kelly's Chief of Staff responded to this chain of emails that (b) (5) (b) (5) She added that she was prepared to have the Secretary's military aide ask him to read an email summary of the issue that night.

McAleenan then drafted an email (b) (5) (b) (5)

(b) (5)

(b) (5)

In response to McAleenan's email, Acting Deputy Secretary Fulghum suggested (b) (5) to which McAleenan replied at 12:07 a.m.:



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(b) (5)

While McAleenan and Hamilton discussed the applicability of the EO to LPRs, OGC prepared a delegation of authority for Acting Deputy Secretary Fulghum to sign in lieu of the Secretary, who had been in transit. Shortly before midnight, Fulghum informed McAleenan that he had signed the delegation. It authorized McAleenan to approve national interest waivers for immigrant and non-immigrant visa holders and to redelegate waiver authority for LPRs to SES-level (or equivalent) operations personnel. Within the next few hours, McAleenan issued the redelegation and DFOs received notice of their new authority, along with an EO implementation memorandum from CBP headquarters.

(b) (5)

Later during the weekend, CBP would be confronted with another set of sympathetic travelers – special immigrant visa (SIV) holders, who were typically Iraqi nationals, some of whom had years of service alongside U.S. forces in combat situations.

4. *The Initial View from the Field*

Upon learning of the EO, initial reactions among members of CBP's senior operations personnel were generally professional, although not devoid of surprise. Some line CBPOs reacted with shock and confusion.

Implementing guidance from headquarters flowed down the chain of command relatively quickly and efficiently. Early Friday evening, DFOs and senior management quickly received email notification from CBP headquarters that the EO had issued and to stand by for guidance. The DFOs promptly forwarded



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the notification and copies of the EO to lower-level supervisors. After additional guidance during the 9:00 p.m. conference call, DFOs passed the information along to their subordinates. Typically, the guidance flowed from DFOs to Port Directors, and from Port Directors to Area Port Directors and Watch Commanders. Then Watch Commanders and other supervisory CBPOs generally shared the guidance with line CBPOs at the start of their shifts at “musters” (roll-call and oral group briefings).

Significantly, CBPOs across the country typically received instructions to care for EO-affected travelers and ensure that they received food, water and rest-room access while they were held in secondary inspection. The details of implementing these instructions were left to the field to improvise. Our investigation found that a number of CBPOs used their own personal funds to purchase coffee or tea for EO-affected travelers, while at some ports CBPOs used the travelers’ funds to purchase food or beverages for them. We examined photographs of detention areas and reviewed a sampling of contemporaneous security video from a handful of airports. We also interviewed as many EO-affected travelers as we could, although many would not speak with us. In addition, we reviewed EO-related complaints that were submitted to the OIG Hotline, and litigation filed in federal courts. Based on our review of available information, we were not able to confirm serious allegations of abuse, although one incident is still under review.



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5. *Initial Travelers Affected*

Over 40 travelers affected by the EO began arriving at John F. Kennedy Airport (JFK), Los Angeles International Airport (LAX), and six other U.S. ports of entry and pre-clearance facilities overseas on Friday night. These travelers would be screened late Friday night and into the early hours of Saturday subject to the terms of the EO and the initial guidance from CBP headquarters. The travelers we interviewed told us, generally, that the DHS employees they encountered were professional, respectful, and accommodating. There was at least one notable exception, however, which we discuss below.²²

For instance, a Syrian-born J-2 (Dependent of Exchange Student Visitor) visa holder who arrived at Dulles International Airport (Dulles) in Virginia, on Friday on a flight from Doha, Qatar described mostly professional and friendly CBPOs. Although she said one CBPO allegedly pointed at her, waved his finger, and yelled at her, she stated that a second CBPO spoke to her politely and explained the situation. She added that a third CBPO attempted to console her as she cried while being driven in a cart to the gate for her return flight to Qatar. She returned to Qatar on the 10:25 a.m. flight Saturday morning. She was able to enter the United States on February 6.

In contrast, another traveler detailed what she described as a frustrating and “harsh” experience on Friday and Saturday at LAX. This traveler, an Iranian national F-1 (Academic Student) visa holder, arrived on a flight from Oslo, Norway, traveling from Vienna, Austria. She stated that she heard CBPOs discussing the EO, which included what she described as “a lot of back and forth discussion amongst them during that time and it seemed that no one understood what was going on.” The traveler added that she never received an explanation regarding the EO throughout the approximately 23 hours she was detained.²³ She described her treatment as “quite harsh,” which included being

²² OIG investigators identified and attempted to interview many travelers, but only succeeded in speaking with 24. Through counsel, some refused to speak with our investigators, despite assurances of confidentiality and that OIG was not investigating or evaluating travelers’ immigration status. We could not locate other travelers. Thus, our sample of 24 may not represent the experience of all travelers. We also cannot discount the possibility that the travelers were fearful of retaliation and, as such, would not disclose evidence of mistreatment.

²³ We discuss length of detention separately, at the end of the report. Although detention times for some travelers could be verified, it was not possible to determine with confidence an average
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given quick orders by CBPOs, having her possessions taken away without explanation, and being roughly searched.

The traveler explained that she wanted to wear her shawl in the detention area, but a CBPO told her that she could not as the shawl was a strangling hazard. She also said she began to experience anxiety while in the detention area and notified an unidentified CBPO of her condition. The traveler said the unidentified CBPO offered to move her to a more private “cell,” which, she said “had a metal bench and a metal toilet[,] the contents [of which] included human waste[,] which had not been flushed,” but she declined. The traveler explained that another unidentified CBPO allowed her to briefly sit in the corridor outside the detention room.

She added that she was not provided with food that conformed to her vegetarian diet. She also stated that felt she was “coerced” into signing an I-275 form because she was told that otherwise she would be “forcibly removed.” She explained that given the way she had been roughly searched, she felt fearful of what forcible removal would mean for her. She also stated that an unidentified CBPO told her not to worry as visas would be reissued. The traveler explained that she overheard an unidentified CBPO discussing her situation with another unidentified CBPO. She described the unidentified CBPO as speaking in a very frustrated and confused tone and she found the situation worrisome because the people in charge did not seem to know what to do. We will return to this traveler’s situation as we discuss compliance with court orders on Saturday, January 28, below.

Also among the travelers arriving on Friday evening at JFK were two who would become lead plaintiffs in a significant case filed the next morning in federal court in Brooklyn: Hameed Khalid Darweesh and Haider Sameer Abdulkhaleq

duration for which the EO-affected travelers remained in secondary inspection. That is because entry and exit times for secondary inspection were not always captured uniformly or accurately. For example, according to the data CBP provided, the duration of secondary inspection for a mother and her two minor children who arrived in the United States on the same flight was 16.8 hours for the mother, 6 hours for one child, and 0 hours for the second child, with an average recorded processing time for this family of 7.6 hours. DHS and CBP explained that processing times can vary for members of the same family and that release from secondary can also be dependent on other factors, such as the availability of onward flights.



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Alshawhi. Darweesh had assisted U.S forces as a translator, and Alshawhi had served as a contractor for a U.S. firm.

B. Saturday, January 28: Evolving Implementation Amidst Media Attention and Court Orders

On Saturday, CBP prioritized favorable adjudication of waivers for LPRs. At the same time, CBP applied the EO relatively more strictly to non-immigrant visa (NIV) holders and immigrant visa (IV) holders until several federal courts issued orders, which caused CBP to modify its implementation of the EO. Altogether, 115 immigrant and non-immigrant visa holders who arrived on Saturday would be denied entry under the EO, after CBPOs determined they were inadmissible and offered them a Hobson’s choice: an opportunity to withdraw their applications for admission to the United States and depart voluntarily without other legal consequences, or face an adversarial expedited removal proceeding with potentially serious legal consequences. It is no surprise which option all EO-affected travelers exercised. CBP also continued to apply the EO at preclearance facilities and through its international operations to prevent NIVs and IVs abroad from boarding U.S.-bound flights.

1. Initial Saturday Morning HQ Guidance

For much of Saturday, at least from the headquarters perspective, CBP’s attention turned to the situation of Special Interest Visa (SIV) holders and refugees from Iraq who fit within the scope of the EO but had also assisted U.S. forces at great risk to their own lives. Guidance would change over the course of the day, as media coverage and judicial scrutiny intensified.

a. HQ Instructions to CBP Field

At 1:07 a.m. on Saturday morning in Washington, a CBP headquarters official transmitted a guidance memorandum to DFOs on implementing the EO. DHS OGC told us that this and all significant guidance was the product of multiple interagency discussions, including teleconferences and other clearance procedures involving DOJ, DHS, CBP and Department of State stakeholders. This document largely mirrored what had been orally communicated to DFOs and others during the 9:00 p.m. conference call on Friday, as follows (paraphrased and summarized):



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- The Department of State had provided a letter provisionally revoking the immigrant and nonimmigrant visas of all individuals from the seven countries, which “may not yet be annotated in the system.”
- After noting DFOs had the authority to grant exemptions for LPRs following a TTRT secondary interview, the memorandum provided suggested language to document the exemption in a CBP database.
- The next group of affected travelers — refugees, asylees, unaccompanied alien children, and persons returning to the United States with advance parole — should all be held at the port of entry until they receive individual exemptions, which would be jointly granted at the Secretary of DHS and Secretary of State level.
- The final category of affected travelers — non-immigrant and first-time immigrant visa holders — should either withdraw their applications for admission to the United States on USCIS Form I-275 without a sworn statement, or be placed in expedited removal proceedings, under standard operating procedures (including giving travelers an opportunity to make credible fear of persecution claims).²⁴
- The NTC-Passenger would coordinate with the Immigration Advisory Program/Joint Security Program and Regional Carrier Liaison Groups where possible to deny boarding to travelers affected by the EO.

The DFOs and CBPOs we interviewed indicated that they timely received the guidance via email and at shift “muster” meetings.

At 1:09 a.m., CBP headquarters also sent out reporting requirements and a template to capture data on affected travelers, with instructions to report at 24-hour intervals by 5:00 a.m. daily. At 8:33 p.m. on Saturday, a revised template would be sent out to the field to capture more information about the categories of EO-affected travelers. Later, CBP headquarters revised the reporting obligations to require thrice-daily reports of encounters with affected travelers.

²⁴ In general, the sworn statement is a record of the alien’s responses to a series of questions posed by the CBPO and on Form I-867B, concerning admissibility and credible fear. A sworn statement is required in expedited removal proceedings, 8 C.F.R. § 235.3(b)(2)(i), but not in cases of withdrawal of an application for admission. 8 C.F.R. § 235.4.



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b. Implementation of Instructions

On Saturday morning, DFOs across the country used their new authority to grant waivers to LPRs, following the mandatory secondary inspection procedure that CBP imposed as part of its EO-implementation. This screening procedure created some lengthy periods of detention, as discussed later in this report.

The waiver process is illustrated by the example below, taken from the Baltimore Field Office (BFO), which covers Dulles International Airport, and Philadelphia and Baltimore air and sea ports. On Saturday, the DFO at that location was in constant telephone and email contact with CBP Port Directors and headquarters. The DFO instructed her subordinates to forward to her all waiver requests for eligible travelers. The DFO stated she evaluated each waiver sent to her and did not “rubber stamp” waivers. The waiver requests, sent by email, typically included the traveler’s biographical details, LPR or visa status, itinerary and purpose of visit, and negative results from the TTRT secondary inspection, if any.

The duration of TTRT interviews under the EO seemed to vary, from as little as ten minutes, to twenty or thirty minutes. One CBPO at Dulles told OIG investigators that the TTRT interviews consisted of the standard “five Ws” (who, what, when, where, and why) asked in any secondary inspection. CBPOs use these questions to develop a profile of a traveler and the purpose of their trip. We saw no evidence that TTRT interviews were different under the EO than those conducted before it issued — other than that CBP used the TTRT interviews under the EO to develop information in order to grant national interest exceptions to affected travelers. Through our review of CBP documents and data, we did not discover any indication that the TTRT interviews uncovered any terrorist threats or derogatory information missed in existing vetting processes.



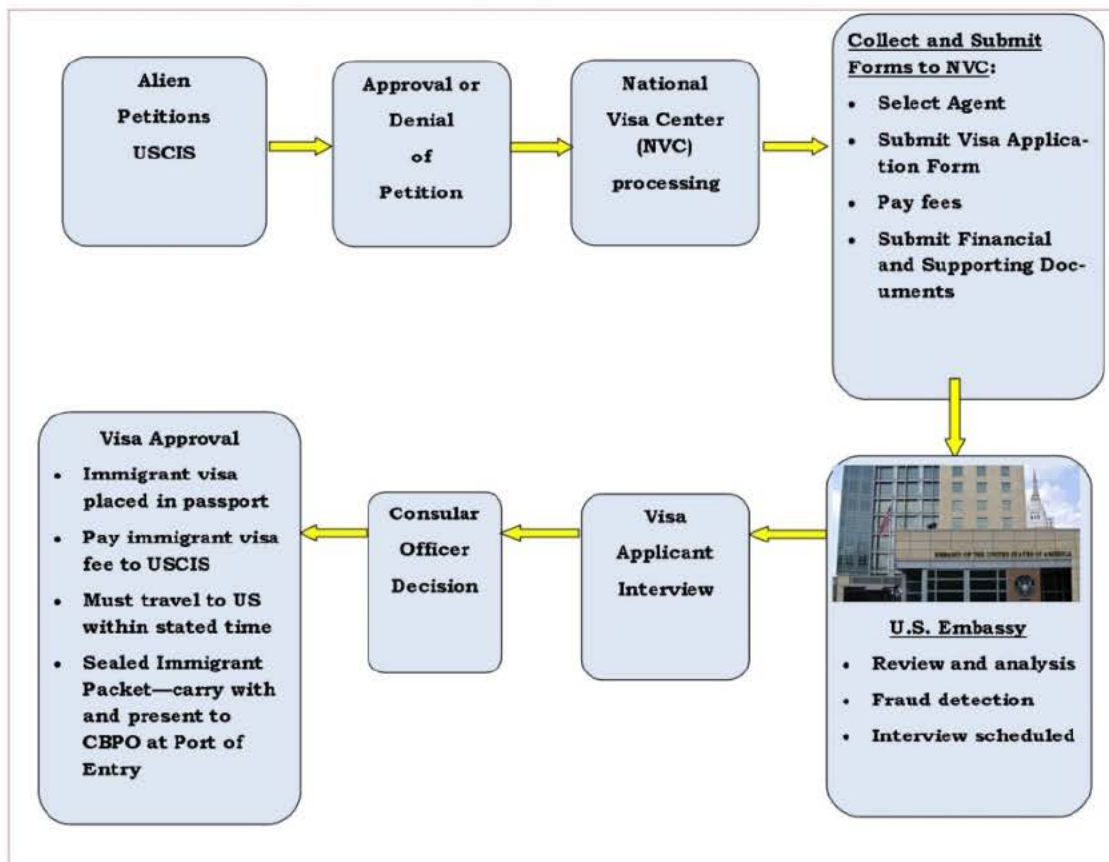
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The secondary inspection that the EO-affected travelers received at the airport was an additional, mandatory step in an already-involved visa process of approvals and vetting that had taken place months before the travel. The following chart illustrates the major steps in the process:

Based on a review of the email traffic, below are a few examples of how the



waivers were accomplished and whom they affected:

- At 9:52 a.m. the CBP Watch Commander at the Port of Philadelphia emailed to his supervisor, the Area Port Director, a list of four LPRs for waivers. (b) (6)



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(b) (6)

(b) (6)

The Area Port Director in turn forwarded the waiver request to the DFO at 10:09 a.m. The DFO approved the waivers at 10:46 a.m. Altogether, from the time the four requests were put into email format and sent up the chain of command, the review and approval took less than an hour. Of course, before the request was ever sent for approval, the affected travelers were diverted to secondary inspection and then subjected to TTRT interviews. The entire process of referring these specific travelers to secondary inspection until the moment when the DFO approved the waivers by email took between two and three hours.

- Similarly, at 9:44 p.m., a supervisory CBPO on the TTRT at Dulles forwarded to the Watch Commander an email containing a waiver request for a mixed group of 11 LPRs of Yemeni and Iranian origin. (b) (6)

(b) (6)

(b) (6)

Eight minutes later, the Watch Commander forwarded the email to the DFO, who approved it at 10:09 p.m. with the comment “[p]lease ensure they are allowed to swiftly depart [...]”. The review and approval process for this Saturday night waiver took less than 25 minutes from the time the field forwarded the request.

Below is a chart that reflects the delegations of authority to grant waivers for LPRs and the daily totals of waivers granted to LPRs at all ports of entry.



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Status of Lawful Permanent Residents (LPRs) Under Executive Order (EO)					
Delegation of Authority to Admit LPRs Under Section 3 (g) National Interest Exemption					
4:43pm DHS Secretary 11:35 pm CBP Commissioner 12:22 am CBP Senior Executive Service					
Limits on DHS Authority to Remove LPRs					
9:00 pm Darweesh (Nationwide) Enjoins LPR Removal 10:00 pm Az/z (Dulles Airport) LPRs Have Attorney Access 11:40 am White House LPRs Not Subject to EO					
No. of LPR Refusals 1	1				
No. of LPR Exemptions 12	418	481	337	211	88
Friday 1/27/2017	Saturday 1/28/2017	Sunday 1/29/2017	Monday 1/30/2017	Tuesday 1/31/2017	Wednesday 2/1/2017

Refusal and exemption dates reflect the dates travelers were admitted from primary or referred to secondary.

Although the time to obtain waivers for LPRs appears to have shortened as Saturday progressed, other classes of EO-affected travelers were not always so fortunate because CBP did not automatically consider them for national interest waivers. Moreover, the Acting Commissioner of CBP still needed to approve their waivers, which sometimes resulted in hours of delay.

c. Guidance to External Stakeholders

Although CBP coordinated with external stakeholders, such as airlines and airport authorities, in an attempt to ensure individuals prohibited from entry by the EO did not board aircraft, the actual guidance appears to have been minimal and not committed to writing. In any event, it was insufficient to prevent additional affected travelers from arriving at ports of entry. The lack of written guidance to the airlines and the failure to have an affirmative media outreach plan created confusion. Thus, at 7:48 a.m. on Saturday, a representative of the American Association of Airport Executives (AAAE) emailed McAleenan and others at CBP, ringing an alarm:

Sorry to reach out on a Saturday however Seattle airport reached out to AAAE last night (after midnight) to say that the ban went



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into effect immediately. 7 individuals were denied entry. Today they have over 900 coming and were asked if locals could provide holding cells since CBP doesn't have enough space. Neither airport nor airline were informed ahead of time that denials were happening. Is there a new policy in place now that has been briefed to airports and airlines? If so, can you please share it or explain it to me. If not, when will this happen? I imagine if this is a problem in Seattle, it will be a huge issue nationwide. Appreciate any assistance you can offer.

At 8:55 a.m., some 16 hours after the EO became effective, McAleenan forwarded this email to OFO officials, stating, (b) (5)

(b) (5)
Over the next hour or so, OFO senior leadership engaged in an email exchange regarding messaging to the airlines and other stakeholders. At 9:23 a.m., a CBP headquarters official wrote, (b) (5)

(b) (5) At 9:28 a.m., the Executive Assistant Commissioner (EAC), OFO replied that (b) (5)

(b) (5)

At 9:46 a.m., the EAC OFO advised McAleenan and others that another call would be scheduled with airline industry groups (Airlines for America, the American Association of Airport Executives, and Airports Council International) and the airlines. In addition, the EAC advised that Port Directors at larger ports would speak with their airport counterparts. By this point, however, hundreds more EO-affected travelers were beginning to arrive in the United States.

A review of relevant emails revealed that the national and local guidance to airline groups, airports, and carriers was orally conveyed, highly generalized, and left many stakeholders to improvise throughout Saturday. For instance, on Saturday afternoon the Area Port Director for the Port of Seattle reported on his engagement with stakeholders as follows:

Airlines wanted to know if they should not board people from the 7 countries? Response: Did not give the airlines any guidance on what to tell their passengers, but did state CBP IAP is actively



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screening passengers at several airports [in] an effort to deny boarding at the point of departure.

Overseas, it appears that confusion was also prevalent on Saturday. For instance, the CBP Port Director for Abu Dhabi — a CBP preclearance facility — requested written guidance for airlines, adding that “everyone to include the CEO of Etihad is drilling me.”

CBP headquarters also did not plan or implement an affirmative media relations strategy, and merely instructed DFOs that all media inquiries were to be directed to CBP Public Affairs in Washington, consistent with the standard practice. CBP headquarters instructed the DFOs not to engage with the media or members of Congress at all. At the same time, public affairs support from Washington was conspicuously absent throughout much of the day as protesters, politicians, attorneys, and families of affected travelers all converged in the public areas of major airports.

Primary and Secondary Processing

Primary Inspection: The initial physical point of contact by CBPOs with a person seeking admission or entry to the United States, typically at a booth or station immediately after crossing a border or disembarking from a flight.

Secondary Inspection: The location or process where travelers undergo further inspection or questioning in order for CBP to determine their admissibility, should admissibility (or other customs concerns) not be determined at primary inspection. Secondary inspection allows inspectors to conduct additional research in order to verify information without causing delays for other arriving passengers.

“Detention” in Secondary: CBP told us that “no travelers subject to the EO were ‘detained,’ but were rather subject to CBP inspections (and in some instances, that inspection may have been prolonged).” In certain passages in this report, we used the terms “detained” or “in custody” due to context, nature of allegations made, or inspection times and conditions that appeared to us to be atypical.

Consequently, the public perception was that CBP’s rollout of the EO was chaotic and involved abusive conduct. Even the Acting Commissioner himself felt constrained to seek approval from Secretary Kelly before engaging with the media. For instance, Acting Commissioner McAleenan told DHS OIG



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investigators that he was instructed not to communicate with congressional representatives or the media until he had formal guidance approved by DHS and CBP attorneys. CBP acknowledged that DHS’s embargo on communications with Congress and the media had a negative impact.

2. *Special Immigrant Visa and Refugee Waivers in the Face of Litigation*

As a typical mild winter morning dawned on CBP headquarters in Washington on Saturday, the *New York Times* was already reporting that immigration lawyers were filing a *habeas corpus* complaint in the Eastern District of New York (Brooklyn), the federal district that covers JFK airport, on behalf of affected travelers being held in “secondary screening.” A link to the *New York Times* article was forwarded to Acting Commissioner McAleenan at 8:27 a.m. He was already dealing with inquiries from the airline industry associations.

The lead plaintiffs in the federal court case in Brooklyn were Hameed Khalid Darweesh and Haider Sameer Abdulkhaleq Alshawi. According to the complaint filed with the court, Darweesh was a 53 year-old Iraqi who had worked for the U.S. government as a translator for U.S. forces. Darweesh had been granted a SIV on January 20, received his travel documents on

Special Immigrant Visa

SIVs for Iraq and Afghanistan are an SIV category that requires a background check and application process, including requirements that the applicant be:

- a national of Iraq or Afghanistan; **and**
- worked directly with the U.S. Armed Forces or under Chief of Mission (Ambassador’s) authority as a translator or interpreter for a period of at least 12 months; **and**
- must have obtained a favorable written recommendation from a General or Flag Officer in the chain of command of the U.S. Armed Forces unit that the applicant supported, as a translator or interpreter, or from the Chief of Mission from the embassy where the applicant worked.

January 25, and arrived at JFK with his family before 6:00 p.m. on January 27. His wife, two minor children, and an adult child, were processed and released quickly on Friday, but Darweesh was held in secondary on an unrelated security concern that was soon resolved, only to be further held after



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news of the EO’s issuance circulated. He would be held until approximately noon on Saturday, when Acting Commissioner McAleenan approved his waiver under Section 3 of the EO, and thereafter admitted him to the United States.

As stated in the complaint, Alshawi was a 33 year-old refugee, who was granted an F2A (“Follow to Join”) visa, which had been granted on January 11, for the purpose of following the members of his refugee family, who were LPRs residing in Texas. Alshawi had worked for a U.S. contractor in Iraq. USCIS and the U.S. Embassy in Stockholm had approved his visa. Alshawi arrived at JFK on January 27 at approximately 8:22 p.m., on a Norwegian Air flight.

In the face of unfolding litigation, CBP and DHS worked diligently to grant both Darweesh and Alshawi exemptions from the EO. But they ran into some practical impediments caused by the drafting of the EO and its weekend release. Each traveler was subject to different provisions of the EO. Darweesh was able to obtain his exemption much more quickly, by noon on Saturday, because he was a SIV holder. Therefore, under Section 3(g) of the EO, the Secretary of DHS had the authority to approve his national interest waiver without State Department concurrence.

In contrast, because Alshawi was a refugee, he was subject to Section 5(e) of the EO. This meant that both Secretary Kelly (or his delegate) *and* the Secretary of State would need to “jointly” issue waivers. When CBP sought a waiver for Alshawi, the DHS Secretary’s authority to issue exemptions for refugees had not yet been delegated to the Acting Commissioner. Also, DHS had not yet worked out a process with State to obtain the Secretary of State’s approval for refugee waivers. Thus, the waiver process for Alshawi would take much longer.

In fact, CBP tried initially to release Alshawi solely under Section 3(g) of the EO and then, prompted by the State Department, realized its error — that Alshawi needed a Section 5(e) waiver (for refugees) for the release to be lawful under the EO. And as of Saturday, neither Secretary had delegated the authority to grant Section 5 waivers. So, throughout Saturday, CBP and State exchanged a series of emails in an effort to obtain Secretary-level approval to admit Alshawi into the country with a Section 5(e) waiver. Around 5:00 p.m., the State Department indicated it was bringing the Acting Secretary of State into the office to sign the waiver for Alshawi. This was after a Deputy Assistant Secretary of State noted



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“lots of reporters at JFK covering this and it is a high priority.” By 5:47 p.m., CBP could report that DHS had approved the Section 5 waiver for Alshawi. Around 6:20 p.m., DHS learned that the Acting Secretary of State, Thomas Shannon, had signed the waiver for Mr. Alshawi. McAleenan directed CBP to process Alshawi promptly, which happened by 6:40 p.m.

3. *Nationwide TRO in Darweesh Case*

If there was any chance that the federal court in Brooklyn would be mollified by CBP’s earlier grant of waivers to Darweesh and Alshawi before the evening hearing on their habeas petition, U.S. District Judge Ann M. Donnelly swiftly dispelled it. A few minutes after that hearing, which concluded just before 9:00 p.m., the judge ordered that the United States and CBP were:

ENJOINED AND RESTRAINED from, in any manner or by any means, removing individuals with refugee applications approved by U.S. Citizenship and Immigration Services as part of the U.S. Refugee Admissions Program, holders of valid immigrant and non-immigrant visas, and other individuals from Iraq, Syria, Iran, Sudan, Libya, Somalia, and Yemen legally authorized to enter the United States.

CBP’s leadership received news of the decision minutes later. (b) (5) DPP
(b) (5) 25 (b) (5)

CBP obtained a copy of the order around 9:30 p.m., but leadership was initially unclear on its meaning or scope. Around 10:20 p.m. CBP received clarification that the court’s order had nationwide effect. At 10:27 p.m., Acting Commissioner McAleenan directed OFO to “please freeze any withdrawals nationwide (b) (5) I know you already had this in place for [New York].” At 10:34 p.m., OFO sent a high priority email to all DFOs nationwide, stating the following:

Based on this evening’s federal court order, we are to suspend all departures of those found inadmissible under the Executive Order,

²⁵ Mr. Alles was sworn in as Director of the U.S. Secret Service on April 25, 2017.

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including those who wished to voluntarily depart. We should freeze all departures but continue to detain the individuals in the airports (b) (5) All pre-departure actions will remain underway.

Need confirmation from each DFO.

In turn, DFOs promptly forwarded this to their Area Port Directors and instructed them to comply and confirm receipt. For example, at 9:00 p.m. CBP counsel called the DFO for CBP's New York Field Office to notify him of the *Darweesh* order. By 9:30 p.m. the DFO had notified his Acting Assistant Director of Border Security (AAD). In turn, the AAD notified the watch commanders and other supervisors that persons from the seven countries were to be held in secondary inspection until further notice. At 9:47 p.m. the AAD received a copy of the court order and shortly thereafter, he received written guidance on implementing the court order, which he distributed to his subordinates. Watch commanders used telephone calls and email to inform subordinate supervisors of the order and the need for immediate compliance.

Also on Saturday night, OFO issued updated guidance to the field, specifying the format and information needed for the Acting Commissioner to approve waivers for the following categories of travelers: returning refugees (which was defined to include first-time refugees); returning asylees; individuals in possession of a valid I-512 (an advance parole document) issued by USCIS; and unaccompanied alien children.

4. *Efforts to Comply with the Darweesh Order in Los Angeles*

In Los Angeles, we found one instance of a traveler sent back to her departure country around the same time CBP received notice of the *Darweesh* order, which should have prevented that return. It appears that CBP officials had unverified reports of the order but, in the absence of official guidance, nevertheless required the traveler to leave. After about 23 hours in custody at LAX, the Iranian national F-1 student visa holder discussed above (who arrived on Friday and complained of her treatment), was sent back to Vienna despite the issuance of the *Darweesh* order. According to the traveler, two unidentified CBPOs escorted her from the detention area to the gate for her flight. She said that around 7 p.m., while she waited in the tunnel to board her plane, she read



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text messages on her phone regarding the temporary restraining order (TRO) staying the EO. She stated that she informed one of the CBPOs, who responded, “Oh – wowza.” Nevertheless, she said an unnamed CBPO instructed her to continue walking to board the plane. The traveler boarded the plane and the flight departed LAX at 7:36 p.m. local time, for Vienna.

It appears that had the traveler boarded her return flight perhaps an hour later, she might have been held and processed for a waiver. According to the Los Angeles Port Director, he initially heard of the TRO in New York while watching the news, however neither he nor the DFO were aware of any local implications at the time. Later, the DFO forwarded an email directing CBP to suspend departures of those found to be inadmissible under the EO. Upon receiving this guidance at 8:10 p.m. local time, the Port Director relayed it to his senior leadership team, directing them immediately to suspend all departures of EO-affected travelers. The Port Director told us that he also contacted one of his watch commanders directly in an attempt to stop the imminent departure of this traveler.

A CBPO Section Chief reported that she learned of the emergency stay when she received a call from her supervisor. The Section Chief said her supervisor “frantically” asked her for the traveler’s outbound flight information so they could get her back and admit her. The Section Chief gave her supervisor the information, but it was too late, as the flight had already gone “wheels-up.” After returning to Vienna, this traveler would fly back to the United States, following additional court orders. She was admitted into the United States in February.

5. *Temporary Restraining Order Applicable in Virginia*

The *Darweesh* case in New York was not the only court order in play for CBP on Saturday. At approximately 10:12 p.m. on Saturday, CBP received notice that a federal judge in the U.S. District Court for the Eastern District of Virginia had issued a TRO in the case of *Aziz v. Trump*. The case had been filed on behalf of approximately 60 LPRs and IV holders, all nationals of Syria, Libya, Iran, Iraq, Somalia, Yemen or Sudan, who landed at Dulles Airport on Friday or Saturday. The TRO ordered CBP at Dulles to “permit lawyers access to all legal permanent residents being detained at Dulles International Airport.” The TRO also forbade CBP from removing LPRs at Dulles from the United



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States for a period of seven days. At the time the TRO issued, there were 5 LPRs still in secondary at Dulles.

With respect to the portion of the TRO mandating lawyers access to LPRs, CBP did not allow such access. As DOJ trial counsel explained to the court at a February 3 hearing, the INA does not provide an applicant for admission the right to be represented by an attorney during primary or secondary inspection unless the inspection “becomes a custodial interrogation or a criminal investigation occurs and a right to counsel attaches.” Therefore, CBP did not permit lawyers to have physical access to the secondary inspection area. Not surprisingly, after the *Aziz* TRO issued, the plaintiffs’ attorneys claimed that CBP failed to comply with the order, because attorneys were not permitted to meet with LPRs in the secure part of the airport and because some LPRs claimed that CBPOs took their phones, thus preventing them from using them to call counsel.

In response to the *Aziz* TRO, CBPOs at Dulles worked to process LPRs as quickly as possible, procuring national interest waivers for them and then releasing them. By approximately 11:30 p.m., 5 LPRs remained to be processed out. CBP OCC conveyed this news to DOJ and DOJ promptly informed plaintiffs’ counsel. Soon thereafter, CBP OCC learned that CBP at Dulles had released the last LPR as of approximately 11:45 p.m., CBP OCC informed DOJ of this news and once again, DOJ promptly conveyed the news to plaintiffs’ counsel. No additional LPRs would arrive at Dulles until Sunday afternoon.

Supervisory and line CBPOs at Dulles described their efforts to implement the TRO. After the Port Director ordered CBPOs to halt returns of EO-affected travelers, a Watch Commander realized an EO-affected traveler who had withdrawn his application for admission (a diversity “DV-1” IV holder) was on board a Turkish Airlines plane, on the tarmac, readying to depart. The Watch Commander ordered a CBPO to call Turkish Airlines and another to call the airport authority in order to prevent the plane from departing. The plane returned to the gate and the passenger disembarked, obtained a waiver, and was admitted to the United States. The Watch Commander explained that she felt she made the right decision because it is very important to do everything possible to comply with a court order.



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6. Court Order Applicable in Washington State

Later Saturday evening, CBP received news of another court order. Visa holders at Seattle-Tacoma International Airport (Sea-Tac) had filed a petition under the case name *Doe v. Trump* for a writ of habeas corpus and motion for an order to grant an emergency stay of removal. Similar to the case of the Iranian student traveler in Los Angeles (described above), timing seems to have played a major role in the fate of the two anonymous plaintiffs, as well as a third Seattle traveler, as detailed below. The three individuals were: an IR-1 IV holder (spouse of a U.S. citizen) from Somalia; a B-1 visa holder from Sudan; and a B-1/B-2 visa holder from Yemen. The two B-1 visa holders were the unnamed plaintiffs in the *Doe* case.

The Somali IV holder arrived from London, England on British Airways flight 53 at 10:48 a.m. PST on Saturday. He presented his immigrant visa packet as the spouse of a U.S. citizen. He was informed of the EO; CBP physically canceled his visa; and he was presented with a voluntary withdrawal form, which he signed. At 1:45 p.m. local time, he was on British Airways flight 52, returning to London. He departed the United States before the *Darweesh* order was issued that evening and before the *Doe* order would issue — both around 6:00 p.m. local time.

The Sudanese and Yemeni travelers both arrived on Emirates Airline 227 from Dubai, United Arab Emirates (UAE), at 6:12 a.m. local time. They were placed on the next Emirates flight to the UAE, which was scheduled to depart at 5:00 p.m. PST that evening. While the travelers were at the boarding gate, CBP learned that the Port of Seattle was delaying the departure of the flight pending a decision by the court on an emergency petition for writ of habeas corpus filed on the travelers' behalf (as John Does 1 and 2). At 5:45 p.m. PST, CBP received notice that the federal judge in Seattle had ruled against the government, ordering the government to stay the travelers' removal. Twenty minutes later, the two travelers were removed from the airplane. The flight was apparently delayed for an hour or so beyond its scheduled departure.²⁶

²⁶ Well before the two John Does' flight was scheduled to depart, CBP officials at Sea-Tac were aware they could ask McAleenan for a national interest waiver. However, they did not do so. They did not remove the two travelers from the flight until after the *Doe* order issued. Then the www.oig.dhs.gov



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The CBPOs were noteworthy in their efforts to comply with this court order. After the court order issued the order, CBPOs at Sea-Tac set up cots with bedding for the Sudanese and Yemeni travelers; provided them food and drink; and provided access to restrooms. Neither traveler was ever handcuffed, placed into CBP detention cells, or transported away from Sea-Tac. After the waivers were approved, CBP arranged for the Sudanese traveler to continue to his final destination of Las Vegas, and for the Yemeni traveler to be picked up by family in the local area.

7. *Coping with Chaos in the Field*

Many of the line CBPOs whom OIG investigators interviewed described the Saturday implementation efforts as relatively smooth, but a significant minority described it as “chaotic” or “organized chaos.” For instance, a Dulles CBPO described Saturday, January 28, as one of the toughest days of his life. He told OIG investigators that he wished the EO had been better explained, especially as to people already inbound on flights. He said that it was especially tough considering that children were involved. He opined that CBP may have “jumped the gun” in returning certain EO-affected travelers so quickly on Saturday.

We found that the lack of public affairs support hindered CBPOs in performing some of their duties. On Saturday, no designated media or congressional liaison were available to deal with the media and politicians, including members of Congress and the Governor of Washington, leaving operational CBP personnel to fend for themselves. On Saturday evening, the Area Port Director at one airport wrote several other Port Directors “I am leaving the airport now. I have over 300 protestors outside the Federal Inspection Station. People are continuing to arrive and they are bringing supplies. I had [a congressman] show up and request to speak to me and my people got rid of him. I am with you . . . , a nightmare.” Also on Saturday, another Port Director described a similar scene, amid 2,500 protestors blocking passenger ingress and egress in the main terminal: “Total mess, I got hammered. At one point I had two congresswomen in my face and the governor and [a senator] on two speaker phones.”

waiver process lasted another 11 hours, creating detention times of approximately 24 hours for each John Doe.

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Protests and media activity were heavy at certain airports across the country. The following provides a brief overview from CBP’s own reporting on media activity for Saturday, organized by field office:

New York Field Office:

- JFK: as of 7:00 p.m. estimated 2,500 to 3,000 peaceful protesters in terminal 4. Members of Congress were also present. 300-400 in the parking lot. Operations were not affected. National Guard, State Police, and NYPD assets deployed.
- Newark Airport: 100 peaceful protesters gathered at Terminal B – International Arrivals.

Baltimore Field Office:

- Dulles: Various events drawing hundreds of protesters; the Governor and Attorney General of Virginia attended a “Protest Rally to Welcome Refugees.”
- Philadelphia International Airport: Estimates hundreds of protesters attended a 2:00 p.m. rally at the International Arrivals Hallway.

Boston Field Office:

- Boston-Logan International Airport: Senator Elizabeth Warren, local politicians, and the ACLU addressed approximately 100 protesters. The Massachusetts District Attorney hosted a press conference outside the CBP Federal Inspection Station area main arrivals door.

Chicago Field Office

- Minneapolis Airport: As of 4:45 p.m. local time, approximately 30-40 protesters gathered and planned to walk through the terminal and meet at the CBP/FIS exit doors, and greet people as they arrived.

Houston Field Office:

- Houston-Bush Intercontinental Airport: 60-70 protesters chanted and clapped while a traveler exited the FIS.



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- Dallas-Fort Worth International Airport: 50-60 protesters at 5:30 p.m. local time, but 800 protestors by 11:40 p.m. local time; 10 different media outlets were covering.

Los Angeles Field Office:

- Los Angeles International Airport: Early in the day, crowd size estimate was 150 persons at the international terminal, resulting in an early closure of the Airport's Public Information Office due to security concerns. Between 4:00 and 5:00 p.m. PST, approximately 150 protesters arrived and held an organized vigil outside the international terminal departure level. Six media vans; reporters interviewed both passengers and protesters. There was no CBP presence in the area.

San Francisco Field Office:

- San Francisco International Airport: 800 protesters outside the FIS exit area, some banging on exit doors at times, with California's Lieutenant Governor present among the protesters.

Seattle Field Office:

- Seattle-Tacoma International Airport: 2,500 protesters reportedly were in the main terminal (as shown in the photograph at right), blocking arriving passengers from leaving and trying to breach security. The port police called other departments for assistance. Several people were arrested and police used pepper spray.



The absence of CBP-initiated messages to the media and public created a vacuum in which stories casting CBP in a negative light proliferated. In the absence of an effective public affairs strategy, public officials and the media often speculated and assumed the worst about CBP's conduct. Had CBP clearly communicated the status of its operations to



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external stakeholders, it may have prevented significant mistrust and misinformation from developing over the weekend.



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C. Sunday, January 29: Coping with Court Orders

Sunday, January 29 was the second full day of EO implementation. U.S. ports of entry continued to process large numbers of EO-affected travelers, now under new guidance issued in accordance with the *Darweesh* order. DHS and CBP each activated Crisis Action Teams in an attempt to manage a centralized, round-the-clock, agency response to the EO and related court orders. Significantly, at the same time, CBP continued its efforts to persuade the State Department to invalidate travelers' visas in its computer systems, thereby preventing travelers covered by the EO from boarding airplanes bound for the United States.

1. Advocating for Permanent Visa Revocations

As noted above, the State Department had provisionally revoked visas of EO-affected travelers on Friday. (b) (5)

(b) (5)

DPP

(b) (5)

DPP

(b) (5) State did not revoke most of the approximately 60,000 visas of affected travelers in its system; rather, it revoked visas in the system only on a case-by-case basis at CBP's request.



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CBP’s actions aimed at travelers still abroad reflect direction from the very top of DHS. For instance, DHS issued a statement Sunday night that said, in relevant part:

We are committed to ensuring that all individuals affected by the executive orders, including those affected by the court orders, are being provided all rights afforded under the law. We are also working closely with airline partners to prevent travelers who would not be granted entry under the executive orders from boarding international flights to the U.S. Therefore, we do not anticipate that further individuals traveling by air to the United States will be affected.²⁷

Also on Sunday night, Secretary Kelly released a statement indicating that each LPR would be subject to a case-by-case national interest waiver determination under the terms of the EO.²⁸ Given that *Darweesh* barred CBP from removing aliens solely on the basis of the EO, the bulk of these national interest waiver determinations were never really in doubt.

2. Expansion of National Interest Waivers to All Travelers

At 1:39 a.m. on Sunday morning, McAleenan circulated new guidance to Port Directors in response to the nationwide stay issued in the *Darweesh* case. This guidance effectively stated that all classes of EO-affected travelers who were already at U.S. ports of entry would be processed for waivers (as long as no derogatory information was found). This would include the reprocessing of travelers whom CBP had previously adjudicated for removal. The new guidance stated as follows:

[F]or travelers who were in transit and for whom denying admission would cause undue hardship, ports of entry shall take the following actions for those limited number of travelers subject to the Executive

²⁷ DHS Statement on Compliance with Court Orders and the President’s Executive Order, Jan. 29, 2017, available at <https://www.dhs.gov/news/2017/01/29/dhs-statement-compliance-court-orders-and-presidents-executive-order>.

²⁸ Statement By Secretary John Kelly On The Entry Of Lawful Permanent Residents Into The United States, available at <https://www.dhs.gov/news/2017/01/29/statement-secretary-john-kelly-entry-lawful-permanent-residents-united-states>.



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Order currently in CBP custody. Ports of entry should assess those individuals by referring them for a TTRT/CTR examination, and where no derogatory information exists, consideration for a waiver pursuant to Section 3(g) or 5(e) as appropriate. If derogatory information is discovered during the examination, the case should be referred to up [sic] the chain to determine appropriate next steps. In any event, no alien subject to the Executive Order may be subject to Expedited Removal or another immediate form of removal. For any alien currently in CBP custody who had previously been processed for Expedited Removal and not yet removed, please re-process according to this guidance.

CBP headquarters acted swiftly to promulgate a defined process for waiver adjudication. At 2:00 a.m., headquarters provided templates to the DFOs for use when submitting waiver requests to headquarters. McAleenan asked Acting Deputy Commissioner Alles to confirm with the EAC OFO in the morning that ports were implementing the new waiver guidance. McAleenan added, “Need to make sure they are working this aggressively.” Shortly thereafter, the field began preparing waiver requests for visa holders.

But there was some confusion at the ports and at CBP headquarters concerning the practical implications of the new guidance. CBP officials worked through the night to provide clarifying guidance. The confusion involved (b) (5)

(b) (5)

(b) (5)

Headquarters initially advised that waivers should only be requested for travelers currently at U.S. ports, however, it soon clarified that waivers should also be requested for travelers who would continue to arrive at U.S. ports. As for travelers at preclearance facilities, headquarters advised, “We anticipate that travelers will miss their flight. Eventual approval however may prevent applicant from being stuck indefinitely in [preclearance] country.”²⁹

McAleenan himself was necessarily deeply involved in adjudicating waiver requests for those caught at U.S. ports because he retained sole authority

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within DHS to adjudicate waivers for most categories of travelers. After a break from email between 2:15 a.m. and just before 7:00 a.m., McAleenan came back on line and requested an update on waivers, given that he had not seen any “over the last 4-5 hours.” McAleenan advised, “Crashing for another hour or two but ready to consider waivers.” About 45 minutes later and continuing throughout the day, McAleenan began to receive waiver requests, which he granted promptly, unless occupied with other EO-related matters. Based on our review of waiver requests that were elevated to McAleenan between 7:45 and 9:30 a.m. on Sunday morning, McAleenan approved nine unique waiver requests an average of 3.25 minutes after the requests reached his inbox. By 2:30 p.m., the Acting Commissioner had approved approximately 75 national interest waivers for IV and NIV holders.

That morning, CBP headquarters recognized that it was “not particularly workable” for the Acting Commissioner to review and process EO exemptions for all non-LPR travelers. Secretary Kelly did not approve a redelegation of waiver authority for first-time refugees until Monday. Redelegations of authority for waivers covering other classes of travelers would take even longer.

3. Crisis Action Teams

Beginning around 8:00 a.m. on Sunday, DHS’s and CBP’s Crisis Action Teams (CATs) began operations. At DHS, the National Operations Center (NOC) activated its CAT “to help support information ingest, report creation, RFIs [requests for information], teleconferencing, notifications, etc.” in connection with the EO. Sunday’s agenda for the NOC CAT included calls with external facing offices, counsel, and DHS leadership to discuss operations updates, interagency issues, legal issues, and pending policy decisions. CBP’s CAT consisted of representatives from the Office of Field Operations, Office of Public Affairs, Office of International Affairs, NTC, U.S. Citizenship and Immigration Services, and the Department of States’ Consular Affairs Section and Refugee Admissions Program. This team worked to monitor EO implementation, to support Congressional and media inquiries, to “provide a central point for tracking pending litigation,” to “[m]onitor engagement with foreign partners,” and to serve as conduit to DHS on the EO. CBP had previously implemented a CAT during the 2015 Ebola crisis and the 2014 surge of Unaccompanied Alien Children on the southwest border. For the DHS CAT, each component and



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headquarters element was encouraged to contribute operational highlights to Senior Leader Briefs, circulated twice daily.

The EO did not just affect CBP. Many other DHS components were also called to respond in some way. For example, the Senior Leader Brief provided a concise summary of DHS-wide activity over the weekend, which included the following:

- **USCIS:** canceled 23 circuit rides (refugee interviews) in Africa, the Middle East, Asia, and Latin America; would continue to schedule refugee interviews for religious minorities; and discontinued interviews in South Africa “where the refugee population is predominantly from Sudan and Somalia.”
- **Coast Guard:** identified 35 EO-affected individuals on four vessels and implemented measures to ensure they remained aboard their respective vessels.
- **Office of Policy:** coordinated calls for the Secretary with United Kingdom and Canadian leadership and received inquiries from the U.S. Embassies in Qatar and United Arab Emirates.
- **Federal Protective Service (FPS):** FPS officers reported to the federal court in Brooklyn, NY to enhance courthouse security, “during a peaceful, but large demonstration.”

4. *Ongoing Compliance with Court Orders*

Federal district courts continued to receive complaints filed on behalf of affected travelers. Secretary Kelly told OIG investigators that on Saturday, he had made clear to DHS that it would “obey the law immediately.” Generally, with respect to CBP’s domestic operations, we found, as illustrated below, that implementation challenges were due to inherent delays and confusion at the field level rather than willful defiance. In this section, we discuss CBP’s compliance with three significant court orders over the weekend.

a. Aziz TRO – Dulles International Airport

At Dulles International Airport in northern Virginia on Sunday, CBP faced continued accusations that it was violating the *Aziz* TRO. Protests resumed at Dulles on Sunday morning, attended by members of Congress who attempted



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unsuccessfully to talk with and obtain information from CBPOs. Members of Congress, immigrants’ rights attorneys, and media representatives were under the impression that CBP officials were defying the *Aziz* order – which directed Dulles CBPOs to allow LPRs access to attorneys – by refusing to allow attorneys into the area where affected travelers were held and, according to some travelers’ accounts, by seizing detained travelers’ phones. Plaintiffs’ attorneys publicly stated they were considering whether to file a contempt of court motion against CBP.³⁰ By Sunday morning, however, there were no LPRs being held at Dulles; all LPRs who had arrived on Friday or Saturday had been released before midnight. There were no LPRs at Dulles due to arrive until Sunday afternoon. However, because neither CBP nor DHS had effectively communicated the steps CBP had taken to comply with the TRO, there was significant mistrust of CBP’s actions at Dulles.

Following negotiations among plaintiffs’ counsel, DOJ, and CBP, the Dulles Port Director circulated guidance concerning what Dulles CBPOs must do to ensure that all LPRs arriving at Dulles could call counsel:

In accordance with the Court order and effective immediately, for those LPRs arriving at Dulles Airport, provide those LPRs with an opportunity to call their counsel while in CBP custody. We recognize that when that call occurs may need to be determined on a case by case basis. But, in no event should we delay that call unnecessarily and/or fail to provide that call, for instance, while the question of whether a waiver is approved is adjudicated.

In addition, as negotiated with plaintiffs’ counsel, CBP agreed to distribute to LPRs at Dulles a two-page list of *pro bono* legal services, which CBP typically provides to aliens who must appear before the immigration court in Arlington. CBP agreed, when distributing the list, to ensure that the telephone number on top corresponded to a specific legal aid organization that was servicing LPRs in connection with the EO. Thereafter, DOJ advised plaintiffs’ counsel that aliens moved to secondary for further processing as a result of the EO would be given

³⁰ M. Shear “White House Official, In Reversal, Says Green Card Holders Won’t Be Barred” *New York Times* (Jan. 29, 2017). In fact, on February 1, the Commonwealth of Virginia, as an intervening plaintiff in the *Aziz* case, carried out this threat, filing a motion seeking a contempt order against CBP, which the court denied.



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a copy of the *pro bono* list and would be allowed to use their own phones or a CBP phone to call listed counsel.

Subsequently, Dulles CBPOs ensured that all LPRs received a copy of the list after preliminary questioning in secondary inspection. CBP told us the delay was intended to allow CBPOs to elicit information to support national interest waivers. Further, at the request of plaintiffs’ attorneys, CBP confirmed that the instructions for treatment of LPRs —to provide the *pro bono* list and contact counsel while still in secondary— were being followed.

Given CBP’s intention to process LPRs for waivers as quickly as possible, and the fact that all LPRs at Dulles received timely waivers, access to counsel for LPRs under the court order became a moot point. CBP’s prompt action is illustrated by the fact that the TTRT interview process decreased from an average of 1-2 hours on Saturday to as little as 15 minutes, later in the day on Sunday, according to CBPOs we interviewed. They attributed this increased efficiency to the advance work that TTRT personnel performed regarding incoming travelers before they arrived at Dulles.

A CBPO at Dulles explained that while Saturday and much of Sunday were “chaotic,” Sunday afternoon began to go more smoothly. That is because LPRs and EO-affected travelers were identified in advance and, as a result, waiver requests were also prepared in advance of the travelers’ arrival. Indeed, the speed with which CBP was processing waivers at Dulles on Sunday is due, at least in part, to the fact that the DFO was in fact approving waiver requests for LPRs in advance — albeit provided that CBPOs did not discover derogatory information during the TTRT interviews. Given the streamlined LPR waiver process, times to obtain waivers were reduced over the weekend from hours to as little as 15 minutes once the DFO received pertinent information about the traveler. Through our email review, we determined that the DFO instructed employees to compile information about arriving travelers affected by the EO before their arrival in order to “have most of the waiver requests teed up and ready to go before they arrive[d].” We also determined that Dulles CBPOs submitted waiver requests to the DFO before travelers arrived, albeit caveating the requests in case they obtained derogatory information after the traveler’s arrival. Two CBPOs reported to us that a supervisory CBPO instructed them to insert made-up information —such as “housewife” for employment status or “visit family” for purpose of visit — into the waiver requests in the interest of



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time. We initiated a separate investigation into this specific allegation of misconduct.

b. Louhghalam TRO – Logan International Airport (Boston)

Meanwhile, in Boston on Sunday morning, CBP received notice from DOJ of a newly-issued TRO that affected travelers at Logan International Airport (Logan). The *Louhghalam* order directed CBP to do several things. First, it ordered CBP to “limit secondary screening to comply with the regulations and statutes in effect prior to the Executive Order [...]”. Second, it directed that CBP “shall not, by any manner or means, detain or remove individuals with refugee applications approved by [USCIS as part of USRAP], holders of valid immigrant and non-immigrant visas, lawful permanent residents, and other individuals from [the 7 countries] who absent the Executive Order, would be legally authorized to enter the United States.” Third, the court ordered that CBP “notify airlines that have flights arriving at Logan Airport of this Order and the fact that individuals on these flights will not be detained or returned based solely on the basis of the Executive Order.” Although only the notice provision appeared to be limited to Logan, CBP’s actions indicate that the government interpreted all provisions of the *Louhghalam* order to apply only to Logan and international flights destined for Logan. We do not dispute that interpretation. We analyze each portion of this order, below.

As indicated, clause 1(a) of the *Louhghalam* order instructed CBP to “limit secondary screening to comply with the regulations and statutes in effect prior to the Executive Order.” We found that on Sunday and succeeding days, CBP referred 74 of 76 EO-affected travelers at Logan to secondary inspection, only admitting directly from primary one 33-year old LPR from Syria and one 53 year old LPR from Iran. All 74 travelers referred to secondary were granted national interest waivers and ultimately were admitted into the United States.

The second portion of the order (that CBP “shall not, by any manner or means, detain or remove individuals” subject to the EO), could fairly be read to mean that CBP was only blocked from detaining or removing otherwise admissible EO-affected travelers once they arrived in the United States. Thus, for EO-affected travelers who had arrived at Logan, CBP attempted expeditiously to admit otherwise eligible travelers after the *Louhghalam* order issued. For



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instance, after learning about the TRO, CBP quickly tracked down the status of the two named plaintiffs and advised them that they had received waivers. In any event, CBPOs at Logan had already been seeking waiver approval for travelers under the *Darweesh* order issued on Saturday. For instance, on Saturday, an Iraqi-born F-1 (Academic Student) visa holder arrived at Logan on a flight from Istanbul, Turkey. She received a national interest waiver at 10:15 p.m. on Saturday night.

We will address the third part of the *Louhghalam* order —notice to airlines and international operations—in Section V of this report, below.

c. Applying *Darweesh* Order at Dallas-Ft. Worth

Nine EO-affected travelers arrived at Dallas-Ft. Worth International Airport (DFW) on Saturday and would remain at the airport until Sunday – being held for more than 24 hours. All of these nine travelers arrived on the same flight from Dubai on Saturday at 9:00 a.m. local time, well before the *Darweesh* order issued on Saturday night in New York. Seven held non-immigrant visas and two held immigrant visas; none were LPRs. The nine were of Iranian and Syrian nationalities. Two were over 70 years of age; four were over 60 years of age; three were adults younger than 60.

Upon arrival, CBP physically canceled all nine visas and denied all nine travelers entry. Seven of the nine signed withdrawal forms and were processed for return to Dubai. But since the return flight to Dubai was not available until 11:25 a.m. local time on Sunday morning, CBP made preparations for the nine travelers to spend the night. Discussion ensued over email whether to transfer the nine travelers to the county jail, per usual procedure (since CBP does not typically conduct 24 hour operations at DFW), or to house them overnight at DFW. Due to the age and medical condition of the travelers, CBP chose the latter option. The email correspondence notes that the family members of the travelers were waiting outside the FIS.

While the travelers waited overnight for the return flight on Sunday, changing headquarters guidance and the *Darweesh* court order issued. By 1:44 a.m. on Sunday morning, CBP field leadership at DFW noted that the “departure[s are] suspended (b) (5) [REDACTED] The Area Port Director for DFW

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told OIG investigators that the DFO called him at 1:00 a.m. on Sunday to tell him to put the returns of the nine travelers on hold.

Likewise, on Sunday morning, immigration lawyers filed a lawsuit on behalf of the travelers detained at DFW. In response, DOJ assured the court that the plaintiffs would not be removed, notwithstanding their earlier execution of withdrawal forms. Based on that assurance, the court waited to issue a ruling.

Since DFOs did not yet have authority to approve waivers for immigrant and non-immigrant visa holders, the templates and narrative text for the nine travelers had to be prepared for approval up the chain of command, all the way to the Acting Commissioner. Along the way, CBP's legal department, OCC, had to approve each of these national interest waivers, thereby contributing to delay. (b) (5)

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(b) (5)

McAleenan approved all nine waivers.

Ultimately, between 2:30 p.m. and 3:30 p.m. local time, it appears that all nine EO-affected travelers were admitted into the United States. Had the DFO had the authority to grant the waivers for visa holders on Sunday, waivers would have been granted and the travelers would have been released hours earlier.

The significant length of detention in this instance — 27 hours — was shaped by unique circumstances at DFW involving the make-up of the traveler class under the EO; the time of arrival; changing policies and various court orders; and the lengthy process for approval of waivers for visa holders by the Acting Commissioner. There were also instances of detentions exceeding 24 hours at other air and land ports of entry. The longest identified detention was 31.5 hours. Given the total lack of warning, as well as the limited capacity for 24 hour operations at DFW (compared to Dulles and JFK, for instance), it does not appear that CBPOs intentionally detained travelers at DFW any longer than necessary. We address length of detention as a stand-alone issue at the end of this report.



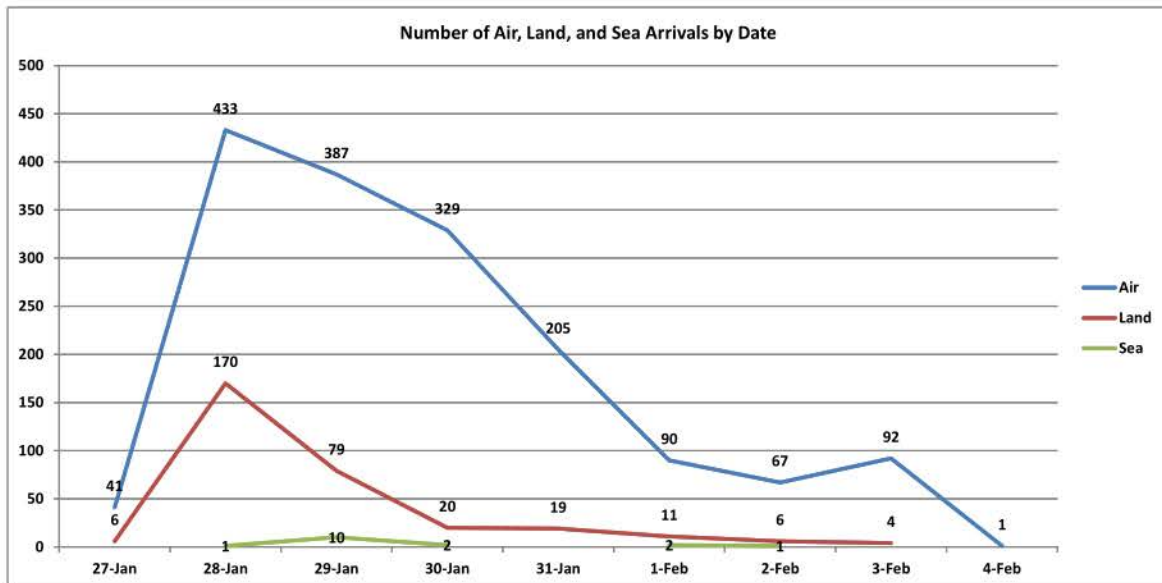
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V. Back to Work: The Work Week

After a very long weekend, the crisis atmosphere began to wane. The numbers of EO-affected travelers arriving in the United States began to decline substantially, along with the number of adjudications required for EO-affected travelers. The chart below represents arrivals of EO-affected travelers by land, sea and air routes on a daily basis:



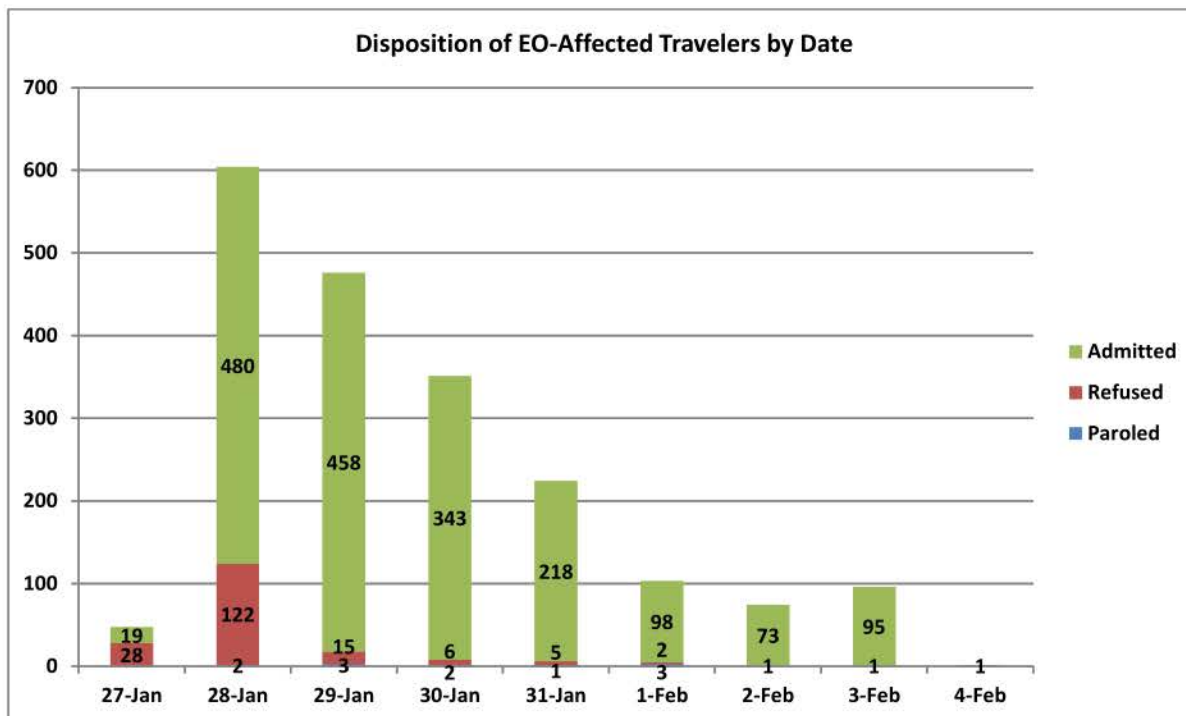


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The chart below captures dispositions of EO-affected travelers by date:



As we shall see below, CBP would delegate to DFOs waiver authority for refugees and holders of NIVs and IVs during the week. Moreover, the story during the work week became one of international operations and implications, as well as continued litigation and compliance with court orders.

A. Domestic Guidance and Operations

1. Continued Redelegation of Waiver Authority to DFOs

CBP quickly identified the need to redelegate national interest waiver authority to DFOs in an attempt to clear backlogged travelers from secondary and reduce wait times for EO-affected travelers. However, DHS would not act until Wednesday afternoon as to most categories of travelers. On Tuesday, January 31, the Executive Director, Admissibility and Passenger Programs, informed DFOs that they had waiver authority for first-time refugees, as well as for LPRs.



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This was especially important because CBP anticipated the arrival of over 870 refugees between January 30 and February 2. These individuals had been approved for boarding, but still would need waivers at the port before they could be admitted to the United States. Then, at 9:26 p.m. on Wednesday, the Acting Commissioner received authorization to further delegate to DFOs his waiver authority for all EO-affected travelers. Official guidance and authority to the DFOs to adjudicate all waivers followed at 10:28 p.m. on Wednesday.

2. *Guidance on Withdrawals*

On Monday night, 48 hours after the *Darweesh* order issued, CBP headquarters finally provided to DFOs in the United States and at pre-clearance facilities abroad guidance (b) (5)

(b) (5)

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Also on Monday evening, then Acting Attorney General Sally Yates was fired for issuing a letter in which she questioned the legality of the EO and instructed DOJ attorneys not to enforce the EO.³¹ DHS stated this introduced several hours of confusion and delay as to whether DOJ would be able to continue to defend the EO in court. (b) (5)

(b) (5)

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Additionally, on Tuesday morning, January 31, a CBP headquarters official sent to all DFOs (including those responsible for foreign operations), a summary of guidance to date concerning the EO. This guidance stressed that CBP would continue to use foreign operations to attempt to block travelers from coming to the United States:

³¹ Evan Perez “Trump fires acting AG after she declines to defend travel ban” CNN (Jan. 31, 2017) at <http://www.cnn.com/2017/01/30/politics/donald-trump-immigration-order-department-of-justice/index.html>.



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The NTC and our pre-departure apparatus to include [the Regional Carrier Liaison Group], [the Immigration Advisory Program], and Preclearance are doing a great job to identify in-scope travelers and deny boarding. (b) (5)

(b) (5) DPP

On Wednesday, February 1, at 3:46 p.m., CBP issued guidance to DFOs concerning “Canadian Landed Immigrants” (lawful permanent residents of Canada) subject to the EO presenting themselves at land ports of entry on the U.S. border with valid travel documents. CBP’s guidance stated that holders of immigrant visas arriving from Canada at land ports of entry “may be considered for an EO waiver.”

3. *Revised White House Position: LPRs Not Subject to EO*

Guidance continued to evolve, based this time on a policy statement from the White House. On the morning of Wednesday, February 1, Counsel to the President Donald F. McGahn II issued “authoritative guidance” on the EO as to LPRs, stating that: “I understand that there has been reasonable uncertainty about whether [the EO] appl(ies) to lawful permanent residents. Accordingly, to remove any confusion, I now clarify that [the EO] do[es] not apply to such individuals.” Just before noon, CBP communicated updated guidance to the field reflecting McGahn’s new policy statement. As a result, DHS and CBP took the position that the DFOs no longer had to adjudicate LPRs under the EO, and that LPRs were no longer to be automatically referred to secondary inspection under the EO.

B. CBP’s Preclearance Operations and “No-Board” Instructions Block Travelers from Reaching the United States

For years, as part of CBP’s “extended border strategy,” CBPOs have been stationed at airports in Western Europe, Asia, the Middle East, and Latin America, where they work to prevent high-risk travelers from boarding commercial aircraft bound for the United States. Using advance information from the NTC, they partner with host government authorities to identify possible terrorists and other high-risk passengers. In countries with CBP preclearance facilities, CBP can directly find travelers inadmissible, thus



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precluding them from being able to board U.S.-bound flights. In countries without CBP pre-clearance facilities, CBP’s liaison officers (IAP, JSP and RCLG) work with airlines to recommend that likely inadmissible passengers not be boarded, and airlines usually comply with these recommendations.³²

1. CBP Pre-clearance Facilities

CBP maintains 15 preclearance facilities in 6 foreign countries: 8 in Canada; 2 in Ireland; 2 in the Bahamas; 1 in Bermuda; 1 in the United Arab Emirates; and 1 in Aruba.³³ These facilities operate under bilateral agreements and are subject to the host country’s national laws; yet CBP generally enforces U.S. law inside the preclearance facilities. For instance, Canadian law allows CBP, in conjunction with Canadian police oversight, to enforce U.S. law in a defined transit area of an international airport. Thus, CBP subjects passengers and items bound non-stop for the United States to inspection and admission determinations, while physically located outside the United States. As these pre-clearance facilities are not on U.S. territory, CBP’s decision at such a facility to determine an alien is inadmissible does not require a removal proceeding. The CBPO can request that the traveler leave, request the traveler to sign a voluntary withdrawal form, or temporarily detain and ask Canadian law enforcement to escort the traveler out of the pre-clearance area.³⁴ Under federal law, and consistent with international obligations, a person may seek

³² For a broader discussion of NTC’s capabilities, see GAO-12-476, “TERRORIST WATCHLIST Routinely Assessing Impacts of Agency Actions since the December 25, 2009, Attempted Attack Could Help Inform Future Efforts” (May 2012) at 19-21, available at <http://www.gao.gov/assets/600/591312.pdf>.

³³ See <https://www.cbp.gov/border-security/ports-entry/operations/preclearance>.

³⁴ See Canada Pre-Clearance Act, S.C. 1999, c. 20; “AVIATION Preclearance Agreement Between the UNITED STATES OF AMERICA and CANADA, Signed at Toronto January 18, 2001,” available at <https://www.state.gov/s/1/treaty/tias/2001/129320.htm>. The INA authorizes the establishment of preclearance facilities abroad for immigration purposes. INA §§ 103(a)(7), 235A. Statutory authorization of pre-clearance facilities for customs purposes is provided separately by statute, see Pub. L. No. 99-570, § 3128 (codified as amended at 19 U.S.C. § 1629(a)) is authorization for agricultural purposes, see Publ. L. No. 107-296, § 421 (codified as amended at 6 U.S.C. § 231). See generally Preclearance Authorization Act of 2015, Pub. L. 114-125, title VIII, subtitle B, §§ 811-819 (2016) (codified in principal part at 19 U.S.C.A. § 4431 et seq.); 8 C.F.R. § 235.5(b).



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protection, such as “asylum,” within the physical territory of the United States, and not, for instance, in pre-clearance areas.³⁵

Yet, the complex nature of CBP’s jurisdiction in foreign preclearance locations is illustrated by the fact that CBP, through DOJ, has brought criminal charges in the United States for bulk cash smuggling at a pre-clearance location abroad.³⁶ Thus, pre-clearance is an area of special territorial jurisdiction of the United States.³⁷ Indeed, CBP’s ability to enforce U.S. immigration law on foreign territory surprised some during the course of the implementation of the EO.³⁸

2. “No Board” Instructions

Airlines that disregard a “no board” instruction face potentially significant financial costs and penalties. If a carrier transports an individual to the United States and the individual is found inadmissible, the air carrier is responsible for ensuring space for such an individual on the next available flight to the originating airport.³⁹ This creates a financial incentive for the airline to comply with CBP’s recommendations. Moreover, an air carrier can be fined for transporting to the United States an alien who does not have a valid passport

³⁵ INA §§ 101(a)(42) (refugee definition), 208(a)(generally according right to apply for discretionary asylum for individuals who are physically present or arriving in the United States), 241(b)(3) (providing for withholding of removal to a given country for eligible individuals who can demonstrate that they more likely than not would be persecuted in that country on account of a protected ground);, *see also* INA § 101(a)(38) (definition of United States); *see also* *Sale v. Haitian Ctrs. Council*, 509 U.S. 155, 159-60 (1993) (holding that neither statutory withholding of removal under the INA nor U.S. *non-refoulement* (non-return) obligations under the 1951 Convention Relating to the Status of Refugees, as incorporated into the 1967 Protocol Relating to the Status of Refugees, applies extraterritorially).

³⁶ *Walczak v. Pittman*, 783 F.2d 852 (9th Cir 1986) (Vancouver pre-clearance).

³⁷ *Witten v. Pittman*, 613 F. Supp. 63 (S.D. Fl. 1985) (pre-clearance agreement creates U.S. jurisdiction in Bahamas pre-clearance facility regarding bulk cash smuggling).

³⁸ “State admits lack of control over US preclearance at airports: Cabinet told it has no legal power over US immigration decisions despite promised review,” by S. Carswell and P. Leahy, *Irish Times*, Wed, Feb 1, 2017, available at: <https://www.irishtimes.com/news/politics/state-admits-lack-of-control-over-us-preclearance-at-airports-1.2958623>.

³⁹ 8 U.S.C. § 1231(c),(d).



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and visa, if a visa is required.⁴⁰ In an extreme case, CBP can deny landing rights to an airline that disregards its “no board” instruction.⁴¹

As the work week began, CBP continued to recommend that airlines “no board” visa holders from the seven countries to prevent their travel to the United States — a policy that was reflected in a written statement that Secretary Kelly issued to DHS employees on Monday, which reiterated his Sunday evening public statement.

So, as of 2:00 p.m. on Monday, CBP noted that “747 individuals with NIV/IV visas have been recommend no-boards.” As of 8:30 a.m. on Wednesday, February 1, CBP had issued another 219 “no board” instruction, for a running total of 966. By Friday, the number was over 1,136, which CBP reported on its website and at press conferences. An internal daily report from OFO’s Admissibility and Passenger Programs on Friday reported the combined “no board” instructions and “no-shows” (travelers who do not check-in for booked flights) figure of 1,222. This had the effect of sharply decreasing the number of EO-affected travelers arriving at U.S. ports of entry during the work week, consistent with DHS’s and CBP’s intended policy. Other factors, such as negative media coverage and individual traveler decisions in light of the EO, may also have contributed to the decline in arrivals.

C. Compliance with Court Orders – International Implications

Here, we discuss how three court orders pertained to CBP’s international operations, and how CBP interpreted the orders.⁴² First, we revisit Saturday’s *Darweesh* order, then the Boston court order in *Louhghalam* that issued on Sunday morning. Then, we move to an order from a federal court in Los

⁴⁰ 8 U.S.C. § 1323; 8 C.F.R. pt. 273.

⁴¹ CBP can deny landing rights for a variety of reasons, including when landing “would not be in the best interests of the Government,” if a flight is destined for an airport designated as a “landing rights airport.” See 19 C.F.R. § 122.14. In addition, CBP can deny an aircraft permission to land at designated international airports based upon security or other risk assessments. See 19 C.F.R. § 122.12.

⁴² The orders discussed in this report are the most significant and far-reaching of the various EO-related court orders during the week in review. As of Thursday, February 2, CBP was actively tracking 28 different federal court cases challenging aspects of the EO.



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Angeles that would issue on Tuesday evening, with broad international implications for CBP’s “no board” instructions under the EO.

1. *Travelers Refused After Darweesh Order*

As discussed above, the *Darweesh* order (issued around 9:00 p.m. on Saturday night) stated that the government (including CBP) was:

ENJOINED AND RESTRAINED from, in any manner or by any means, removing individuals with refugee applications approved by [USCIS] as part of the [USRAP], holders of valid [IVs and NIVs], and other individuals from Iraq, Syria, Iran, Sudan, Libya, Somalia, and Yemen legally authorized to enter the United States.

Likewise, CBP’s initial national guidance, issued at 10:34 p.m. on Saturday, stated, in relevant part, that “we are to suspend all departures of those found inadmissible under the Executive Order [...] We should freeze all departures but continue to detain the individuals in the airports [...] All pre-departure actions will remain underway.” Several hours later, at 1:39 a.m. on Sunday, CBP issued additional guidance that stated in pertinent part, “For any alien currently in CBP custody who had previously been processed for Expedited Removal and not yet removed, please re-process....” CBP appears to have interpreted the *Darweesh* order very literally: it barred removals from the United States, but allowed all other enforcement actions under the EO, including issuing “no board” instructions to the airlines overseas. After the *Darweesh* order and accompanying guidance were issued CBP nevertheless directly blocked the admission of 30 EO-affected travelers to the United States at its pre-clearance facilities and land borders.⁴³ The graph below shows the dates those 30 travelers were refused and their immigration status:

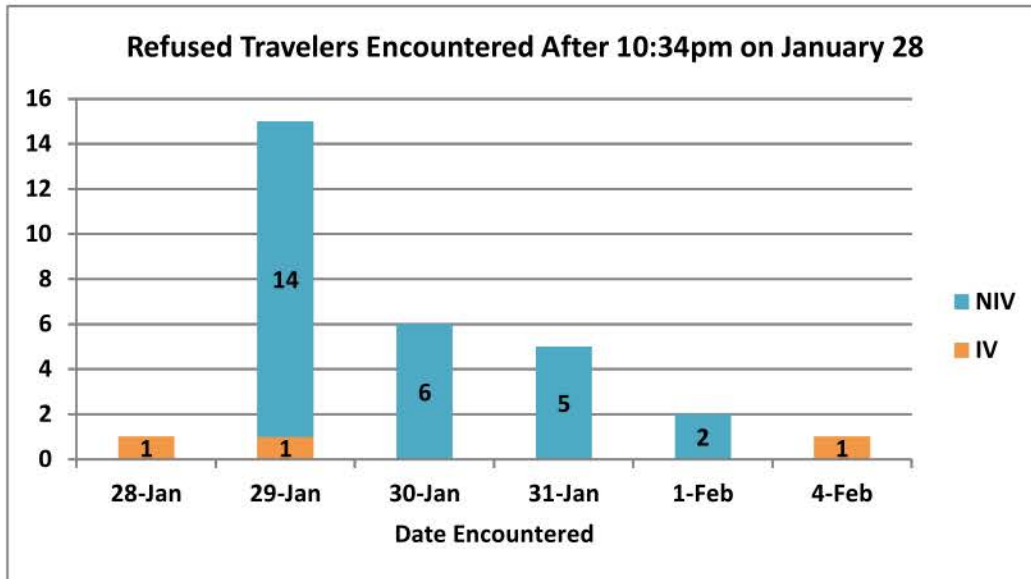
⁴³ “No board” instructions to airlines are a separate category.
www.oig.dhs.gov



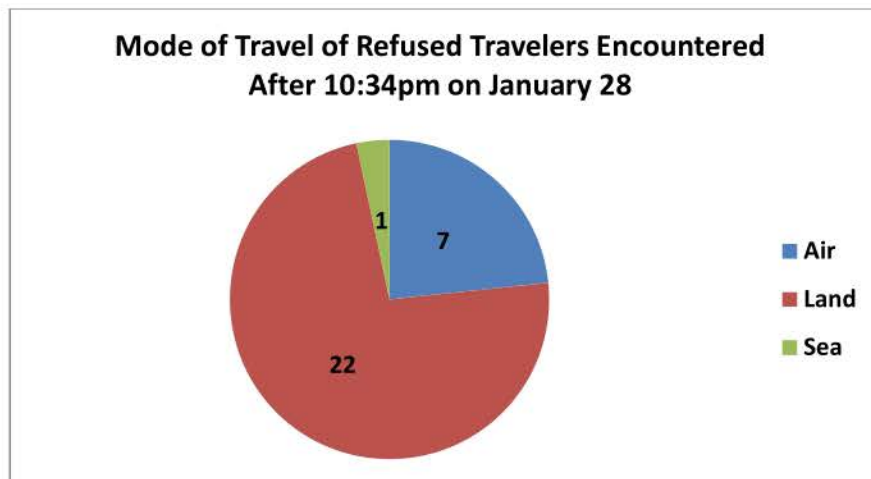
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More than half (73%) of the refusals of travelers encountered after 10:34 p.m. on Saturday, January 28, took place at northern border land ports. Seven travelers were refused at airports, all of which were pre-clearance locations overseas. The chart below captures the refusals after the *Darweesh* order by mode of arrival:





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The table below shows the breakdown of refusals by date, port of entry (POE), and immigration status:

Refusals After 10:34 p.m. on January 28			
Date and Place Encountered	Immigrant Visa Holders	Nonimmigrant Visa Holders	Total
28-Jan (Saturday)			
Abu Dhabi PRE-CLR (pre-clearance)	1		1
29-Jan (Sunday)			
Detroit, Windsor Tunnel / Ambassador Bridge		7	7
Blaine, WA, POE		2	2
Port Huron, MI, POE		1	1
Ottawa PRE-CLR		1	1
Buffalo, POE		1	1
Toronto PRE-CLR		1	1
Abu Dhabi PRE-CLR	1		1
Lynden, WA, Border Crossing		1	1
30-Jan (Monday)			
Detroit, Windsor Tunnel / Ambassador Bridge		3	3
Ottawa PRE-CLR		1	1
Blaine, WA POE		1	1
Miami Seaport		1	1
31-Jan (Tuesday)			
Toronto PRE-CLR ⁴⁴	1		1

⁴⁴ One traveler appears twice in this chart based on two different encounters with CBPOs at Toronto pre-clearance. First, on Tuesday, January 31, a CBPO at Toronto pre-clearance refused to admit the traveler into the United States due to the EO. The CBPO physically canceled the traveler's visa. Then on Saturday, February 4, after the *Washington v. Trump* TRO suspended enforcement of the EO, a CBPO at Toronto pre-clearance refused to admit the same traveler because the visa had been previously physically cancelled. We attribute both actions to the EO.



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Refusals After 10:34 p.m. on January 28			
Date and Place Encountered	Immigrant Visa Holders	Nonimmigrant Visa Holders	Total
Port Huron, MI, POE		1	1
Blaine, WA POE		1	1
Vancouver PRE-CLR		1	1
Detroit, Windsor Tunnel / Ambassador Bridge		1	1
Eastport, ID, Border Crossing		1	1
1-Feb (Wednesday)			
Detroit, Windsor Tunnel / Ambassador Bridge		2	2
4-Feb (Saturday)			
Toronto PRE-CLR	1		1
Total	4	36	40

In all of the above refusals, CBP offered withdrawals and enforced the EO as if the national interest waiver option was unavailable. Excluding the substantial number of “no board” instruction to airlines overseas (discussed further below), CBP’s denials of entry based on the EO after the *Darweesh* order, occurred at U.S. land and sea ports, and several preclearance facilities. CBP also denied entry to the traveler at LAX who informed CBPOs of the *Darweesh* order but was nonetheless sent back to Vienna, as discussed above in Section IV.B.4.

Based on our review of the data, we identified one traveler, a Canadian landed immigrant, who was denied entry under the EO several times during the week under review. The affected traveler was an Iranian citizen and Canadian resident with a DV1 immigrant visa. CBP last denied him admission on Saturday, February 4 at Toronto preclearance, because his visa had been physically revoked several days before due to the EO — despite the Washington TRO, which we discuss below.

Because the *Darweesh* order did not address CBP’s practice of issuing “no board” instructions, we cannot say that CBP technically violated the letter of that order. However, the *Darweesh* court found that plaintiffs had a substantial



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likelihood of showing that CBP’s actions violated the Due Process and Equal Protections clauses of the Constitution. The fact that CBP nonetheless felt itself free to deny boarding overseas seems to be a highly aggressive stance in light of the court’s concerns. Additionally, with respect to pre-clearance facilities in Canada, CBPOs still extracted withdrawals and denied admission to travelers after the *Darweesh* order and CBP guidance.

2. Louhghalam TRO’s International Application

In Section IV, above, we addressed the first two portions of the Sunday, January 29 *Louhghalam* order concerning CBP’s domestic operations at Logan. The third portion of the order, as shown below, directed CBP as follows:

d) Customs and Border Protection shall notify airlines that have flights arriving at Logan Airport of this Order and the fact that individuals on these flights will not be detained or returned based solely on the basis of the Executive Order.

We found that CBP timely provided the airlines with a copy of the court order and communicated with airlines via email and conference call. At the same time, however, CBP continued to issue no-board instructions and to do everything in its power to block travelers who had not filed litigation from boarding flights bound for the United States. Despite CBP’s best efforts to block these travelers from coming to Boston, CBP had limited success due to factors discussed below.

The case of one Iranian J-1 NIV holder, a physician and tuberculosis researcher, illustrates the issue. In a complaint filed in federal court on Wednesday, February 1, the traveler described her situation. On Saturday, January 28 and Tuesday, January 31, she was denied boarding for two different Boston-bound flights based on two no board instructions from CBP. During her second failed attempt, which was after the *Louhghalam* order had issued, a Swiss Air representative told her that CBP had recommended that she not be permitted to board the flight to Boston. According to the doctor, she had a copy of the order, which she showed to the agent, but the agent advised



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that Swiss Air had to comply with CBP’s “no board” instruction. Separately, Swiss Air’s legal department informed the traveler’s attorney that CBP had warned the airline of “the potential for fines up to \$50,000 and refusal of permission for the flight to land.” The no board instruction itself also contradicted the intent of the *Louhghalam* order: it stated that “[t]he individual will likely be deemed inadmissible upon arrival at a U.S. airport or preclearance location ...” as shown below:



U.S. Customs and
Border Protection

NOTICE TO AIR CARRIER

Attention Swiss Airlines Personnel,

The U.S. Department of Homeland Security (DHS), U.S. Customs and Border Protection (CBP), recommends the following action(s) be taken regarding the individual listed below:

— **Recommend Denial of Boarding (U.S. Person)** – [REDACTED]

XXX **Recommend Denial of Boarding (Non-U.S. Person)** – The individual will likely be deemed inadmissible upon arrival at a U.S. airport or preclearance location and should be referred to the U.S. Embassy/Consulate for further assistance.

— **Verification of Documents** – [REDACTED]

— **Screening** – [REDACTED]

In fact, had this traveler reached the U.S., under the *Louhghalam* and *Darweesh* orders, she would have been processed for a national interest waiver and almost certainly admitted. CBP and the DOJ were both aware of this traveler’s claim to be within the scope of the *Louhghalam* order, as illustrated by the email sent from her attorney to DOJ counsel and Swiss Air representatives on January 31:

Exemption 5
(DPP);
Exemption 6;
Exemption
7(C).



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To: [REDACTED]@usdoj.gov'; [REDACTED]@usdoj.gov'; [REDACTED]@usdoj.gov'; [REDACTED]@usdoj.gov'
Cc: [REDACTED] 'stationmanagerzrh@swiss.com'; 'sipo@swiss.com'
Subject: MOST URGENT [REDACTED] /no. 17-cv-10154, Tootkaboni et al. v. Trump et al.

Dear counsel –

Our client Ms. [REDACTED] who holds a J-1 visa and is within the scope of Judge Burroughs' Sunday order, having been ticketed to Logan on Saturday and turned away at the Frankfurt gate, is now at the Swiss gate in Zurich, attempting to board a flight. Swiss needs your assurance that the flight has permission to land, and is advising us that, after the Court's order entered on Sunday, and in contravention of the order, it has been advised by CPB that she is not permitted to board. Please ASAP contact Swiss in Zurich to confirm that Ms. [REDACTED] may board and the aircraft will be given permission to land at Logan without penalty.

Please confirm to the two Swiss CCs asap in writing that she has permission pursuant to paragraph D of Judge Burroughs' order issued Jan. 29, 2017, and that there will be no difficulties upon arrival.

Need asap, plane is now boarding.

Exemption 6;
Exemption
7(C).

CBP still refused to allow the traveler to board. This decision cost the Iranian medical researcher several days of further delay. But after the traveler filed a motion for a TRO on February 2, CBP allowed her to board a Boston-bound flight and admitted her to the United States on Friday, February 3.

Around the same time that McAleenan was approving boarding of this Iranian medical researcher by issuing a waiver, CBP was issuing "no board" instruction to prevent another 20 EO-affected travelers from boarding two Lufthansa flights from Zurich to Boston (one of which would board the Iranian medical researcher). But Lufthansa had other ideas.

On Friday February 3, CBP learned that Lufthansa rejected its "no board" instructions for 20 travelers on the two Boston-bound flights. The travelers were IV and NIV holders for whom NTC checks did not identify any derogatory information. CBP confirmed that its Immigration Advisory Program team lead, a Supervisory CBPO stationed in Frankfurt, personally delivered the "no board" instruction "to the Lufthansa flight manager at the departure gate" of flight 422, which was scheduled to arrive at Logan at 1:10 p.m. on Friday. Lufthansa corporate security acknowledged the recommendation, but boarded the passengers anyway, based on guidance from Lufthansa's legal department.



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Because of pending litigation, Lufthansa took the position that it would accept nationals from the seven EO-covered countries who possessed valid visas on the Boston-bound flight until February 5 (the date the *Louhghalam* order was set to expire). CBP was not pleased with Lufthansa's actions. (b) (5)

(b) (5)

(b) (5)

In the end, CBP granted waivers for all 20 EO-affected passengers whom Lufthansa had boarded over CBP's objections.

In our view, CBP's actions in transmitting a copy of the order, but then issuing "no board" instructions to the airlines that stated that travelers would likely be found inadmissible upon arrival — with an accompanying threat of fine and potentially denying the plane landing rights— circumvented the *Louhghalam* order. Lufthansa's actions in ignoring CBP's instructions effectively mooted the issue.

3. *Los Angeles Court Order – Mohammed v. United States*

At approximately 7:30 p.m. PST on Tuesday, January 31, a federal court in Los Angeles issued an order with broad implications for CBP's international operations. Thirty named plaintiffs who were attempting to fly from Djibouti to Los Angeles secured a TRO, which ordered, in relevant part, the following:

1. Defendants and their officers, agents, employees, attorneys, and all other persons acting in concert or participating with them, are **ENJOINED AND RESTRAINED** from enforcing Defendant President Donald J. Trump's January 27, 2017 Executive Order by removing, detaining, or blocking the entry of Plaintiffs, or any other person from Iran, Iraq, Libya, Somalia, Sudan, Syria and Yemen with a valid immigrant visa;
2. Defendants, and Defendant United States Department of State in particular, are hereby **ENJOINED AND RESTRAINED** from cancelling validly obtained and issued immigrant visas of Plaintiffs
3. Defendants, and Defendant United States Department of State in particular, are hereby **ORDERED** to return to Plaintiffs their passports containing validly issued immigrant visas so that Plaintiffs may travel to the United States on said visas; and

DPP and
A/C



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4. Defendants are hereby **ORDERED to IMMEDIATELY** inform all relevant airport, airline, and other authorities at Los Angeles International Airport and International Airport in Djibouti that Plaintiffs are permitted to travel to the United States on their valid immigrant visas.⁴⁵

CBP complied with paragraphs 2-4 of the TRO, issuing instructions to allow the named plaintiffs to travel from Djibouti and thereafter be considered for waivers at ports of entry in the United States. These paragraphs are straightforward and appear limited to the travelers from Djibouti. But we cannot say the same with respect to paragraph 1 of the *Mohammed* order.

The plain language of paragraph 1 of the *Mohammed* TRO had no geographic limits, and was specifically not limited to the named plaintiffs. Moreover, its scope went beyond the *Darweesh* and *Louhghalam* orders. Not only was CBP enjoined from detaining or returning EO-affected travelers, but paragraph 1 of the *Mohammed* TRO further ordered CBP not to “block[] the entry of Plaintiffs, or any other person.” Thus, the language of the order encompassed all travelers, not just the 30 travelers at issue. The language “block the entry” fairly meant that CBP could not use its international operations to prevent EO-affected travelers from boarding flights bound for the United States. This reading is reasonable because paragraph 1 already addressed the concepts of removal and detention, and construing “block the entry” as synonymous with not removing or detaining travelers would render that phrase meaningless.

National media coverage of the *Mohammed* TRO, of which CBP was aware, discussed the TRO’s broad applicability and its overseas reach. For instance, the *New York Times* noted “[t]he ruling could affect hundreds of people who are in their home countries or stuck in airports in other countries, hoping that they would somehow be permitted to travel to the United States.”⁴⁶

However, the *Mohammed* TRO did not slow CBP’s efforts to block EO-affected overseas from traveling to the United States. As stated in a “notice of compliance” that the government filed with the *Mohammed* court on Thursday,

⁴⁵ Emphasis in original.

⁴⁶ Jennifer Medina, “Judge Orders U.S. to Let in Immigrant Visa Holders,” *New York Times*, Feb. 1, 2017, at <https://www.nytimes.com/2017/02/01/us/politics/california-judge-trump-immigrant-visa-holders.html>.



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February 2, the government was working to facilitate only the named plaintiffs' travel to the United States. With respect to all other travelers, however, CBP maintained its position that their visas were invalid, having been provisionally revoked, and therefore had no basis to travel to the United States. Specifically, CBP argued that because the State Department had, on Friday, January 27, revoked all otherwise valid immigrant visas from the seven affected countries, paragraph 1 of the TRO had no effect. In essence, because after Friday no one had any valid visas, no one was being "blocked."

Thus, Acting Commissioner McAleenan forwarded guidance to field operations requiring that the named plaintiffs be allowed to board their flights. The airlines received similar instructions. The court never had the opportunity to rule on CBP's argument regarding the broader class; the nationwide injunction in the *State of Washington* case, issued in the evening of Friday, February 3, effectively mooting the argument.

These exchanges, and CBP's position in court, illustrate a logical inconsistency: CBP viewed its national interest waiver authority as sufficient to grant admission to aliens holding what it, nevertheless, claimed were invalidated visas. This was, however, consistent overall with DHS's and CBP's actions: comply domestically with court orders, but resist judicial review of CBP's international operations.

We found that CBP was willing to comply narrowly with the court order as to the named plaintiffs in Djibouti, while still leaving itself free to prevent boarding of EO-affected travelers at other locations overseas. Thus, CBP continued to attempt to block boarding at other overseas locations, despite the language in *Mohammed*. (b) (5)

A/C and
DPP

(b) (5)

(b) (5)

The actions of the government in the *Mohammed* case were not isolated. In fact, they spanned multiple courts and plaintiffs.

Indeed, the *Aziz* plaintiffs' counsel noted during a Friday, February 3 hearing in Alexandria, Virginia, while describing CBP's response to litigation concerning EO-affected travelers, that "there appears to be some strategic maneuvering here not by counsel but by counsel's client [CBP]. So whenever one of these folks comes forward and files a lawsuit and intervenes, they are immediately



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presented with a deal that “[d]rop your case and I’ll bring your person back and dismiss your case with prejudice,[’]...” Based on our review of the federal court cases involving EO-affected travelers, the email correspondence with plaintiffs’ counsel, the internal waiver processes at CBP, and CBP’s actions with respect to international airlines, we conclude that plaintiffs’ counsel was correct in his assessment. Moreover, we are troubled by the following statement that the government made in response: “[t]here’s no strategic mooted of cases out occurring here from the government’s view.” That is, in our view, simply at variance with the facts.

4. *Other International Effects of the Travel Ban*

We note that the EO also had other effects on CBP’s international operations. When the EO issued, CBP was in active negotiations to establish preclearance facilities at international airports in addition to the 15 existing facilities in Canada, Ireland, the United Arab Emirates, and elsewhere. As a result of the international uproar in response to the EO, the Dutch government paused negotiations for a preclearance facility at Amsterdam Airport Schiphol.

In addition, CBP granted a request by Icelandic officials to postpone a preclearance expansion technical meeting, scheduled for February 1-3, based on the reaction to the EO. Lastly, Irish criticism of the EO resulted in the Prime Minister ordering a review of preclearance facilities at Dublin and Shannon airports to ensure operations did not conflict with Irish legal obligations.

D. **Final TRO Halting Implementation of the EO**

The last and most significant court order concerning the EO issued on Friday, February 3 in *State of Washington v. Trump*. Because of this TRO, CBP halted enforcement of the EO nationwide. In the complaint, filed on Monday January 30, the State of Washington claimed harm to the state’s economy based on the impact of the EO on the approximately 7,280 non-citizen immigrants from Iran, Iraq, Syria, Somalia, Sudan, Libya, and Yemen who resided in the state as of 2015. Washington sought to have the EO declared unconstitutional and to enjoin the government from enforcing it.

At approximately 7:00 p.m. EST on Friday evening, CBP received notice of a new nationwide TRO issued by the U.S. District Court for the Western District



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of Washington. The TRO explicitly enjoined the government from enforcing the “travel ban” portions of the EO: Sections 3(c), 5(a), 5(b), 5(c), and 5(e). Faced with this unambiguous suspension of entire sections of the EO nationally, CBP had no recourse but to suspend its EO enforcement efforts. The TRO eliminated the exceptions and arguable ambiguities present in previous court orders.

So, by 8:23 p.m., Acting Commissioner McAleenan emailed guidance to the field directing the cessation of all actions related to the EO. Around the same time, CBP notified airlines and airline associations of the TRO. In parallel, CBP worked to confirm that the field complied promptly with the TRO. At 10:24 p.m., McAleenan confirmed to DHS that CBP had complied with the injunction. Meanwhile, Deputy Assistant Secretary of Consular Affairs Ramotowski sent CBP a letter to “reverse the provisional revocation of all visas provisionally revoked by [his] letter of January 27, 2017.”



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VI. Allegations of CBPO Misconduct Largely Not Corroborated

During the course of implementing the EO, several misconduct allegations surfaced against CBPOs. We examine the most significant of those: intentional use of excessive detention and poor conditions in secondary holding areas; misuse of restraints; handcuffing of children; and that CBPOs forced applicants for admission to sign withdrawal forms. Overall, we were able to verify very few incidents of misconduct on the part of line-level CBPOs. Our task was complicated by the unwillingness of many travelers to be interviewed by OIG agents, despite our assurances that we were not investigating immigration status and would maintain witness confidentiality.

A. Use of Restraints

Our investigation identified three instances in which restraints were used on EO-affected travelers. We are unsure whether this is the universe of the use of restraints, based on the records available to us from CBP. The first, involving a couple at the DFW, is currently under investigation by OIG to determine if the use of restraints was reasonable.

The second two incidents involved the San Ysidro land border. On Friday, January 27, an Iranian-born LPR applied for admission to the United States from Mexico at the San Ysidro Port of Entry at the pedestrian primary inspection location. According to the LPR, CBP detained him overnight before releasing him into the United States at approximately 5:30 a.m. on Saturday. The LPR stated that CBPOs handcuffed him for approximately 30 minutes when they brought him to another building, where they shackled his leg to a bench for another 30 minutes. He added that he was not placed in restraints for longer than one hour. On Saturday, an Iraqi-born LPR also presented himself at the San Ysidro POE. The Iraqi-born LPR said that CBP detained him for approximately 16 hours before eventually admitting him into the U.S. He described the officers as "very nice" and "apologetic" and described their manner as professional. He said he was handcuffed by CBPOs for approximately 15 minutes, and that the CBPO stated that the handcuffs were for safety purposes while they transported him by van to another office near the border.



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B. False or Unfounded Claims of Handcuffing

Several news outlets reported that a five year-old child was handcuffed and detained at Dulles for several hours on Tuesday, January 30. It was also reported that numerous unidentified people began sharing an image on social media of a child in handcuffs. Without verification, people assumed that the handcuffed child depicted in the photograph was affected by the EO. Further research of the image revealed it was from an August 2015 incident involving a deputy sheriff in Kenton County, KY, who handcuffed an eight year-old child at a local school.

Other media outlets erroneously reported that another five year-old was handcuffed and detained at Dulles during the EO. A statement posted online by a U.S. Senator described the incident involving the child and included a statement by the child's mother. Neither the Senator nor the child's mother described any handcuffing incident involving the child while the child was detained by CBP. A review of CBP's records did not reveal any indication that a CBPO handcuffed the child.

C. Claims that CBPOs Forced Applicants to Sign Withdrawal Forms

Several EO-affected travelers claimed to have been coerced into signing forms to withdraw their applications for admission to the United States. CBP would have been aware of the allegations, given arguments that some plaintiffs' attorneys had made in court. Moreover, after the *Darweesh* order, the presumption of granting national interest waivers meant that, in principle, asking travelers to withdraw their applications for admission (without first seeking a waiver) could violate the court order (b) (5)

(b) (5)

DPP

We reviewed specific allegations of overt coercion that contained sufficient detail to allow for a meaningful inquiry. Those examples occurred before the *Darweesh* order issued.

For instance, on Saturday, January 28, a Saudi Arabian-born, Sudanese H-1B NIV holder arrived at JFK on a flight from Jeddah, Saudi Arabia. During her



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interview with DHS OIG, the Sudanese H-1B NIV holder stated that CBPOs withheld food until she agreed to withdraw her application for admission. She also stated that she was given a choice of signing Form I-275 to withdraw her application for admission or be denied entry into the United States while facing a five-year ban from applying for admission. She added that the CBPOs explained the benefits of withdrawing her application and advised that she choose to do so. She also said she believed that no DHS employee said or did anything that was inappropriate. Her statement to DHS OIG investigators somewhat contradicted a sworn declaration that she filed earlier in the *Darweesh* case. In that declaration, prepared by an attorney, she had claimed that a CBPO informed her that the only way she would be permitted to leave the detention area was to sign a form to return to Saudi Arabia. In the declaration, she also stated that she felt rushed to sign the form.

Also on Saturday, January 28, six members of a Syrian family, all F visa holders (Academic), applied for admission to the United States at Philadelphia International Airport, Philadelphia, PA after arriving on a flight from Doha, Qatar. According to three members of the Syrian family who agreed to be interviewed by DHS OIG investigators, they stated that their secondary inspection took approximately two hours. They stated that they felt like they were treated like criminals. They were not afforded the opportunity to consult with an attorney. They also were not permitted to make telephone calls and were required to stay in the secondary inspections area. They were photographed, fingerprinted and processed. They were given the option to return on the next flight or risk being detained overnight and sent back to Syria the following day. The CBPO also told them that they would be subject to a five-year ban from entering the United States if they did not voluntarily depart. The family felt that voluntarily returning on that flight to Syria was their only option if they wanted to return to the United States after the EO was lifted. After doing so, the family ultimately returned to the United States and was successfully admitted on February 6. Their return to the United States occurred after filing a complaint in federal court.

Again, on Saturday, as reflected in court filings, two Yemeni-born first-time immigrants to the United States who landed at Dulles on a flight from Addis Ababa, Ethiopia, claimed that they were instructed to sign forms that they did not completely understand. Despite our attempts to interview them, they declined, through counsel, to talk to us.



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The examples above illustrate that the EO's sudden implementation presented travelers on Friday and Saturday with a stark choice: either voluntarily withdraw and be able to return to the United States without any penalty, or be placed in expedited removal, and face potential debarment from reentry of up to five years. By simply explaining these facts to an already stressed traveler facing an unexpected situation, even the most patient and respectful CBPO could be perceived as pressuring the traveler, depending on the traveler's subjective experience. Given the difficulty in proving a negative, we cannot say that there were no isolated incidents in which CBPOs pressured or advocated forcefully for travelers to sign a withdrawal form. It is also possible that isolated incidents occurred after the *Darweesh* order. The smattering of withdrawals at preclearance locations abroad and at land borders after the *Darweesh* order issued suggests that the practice was isolated.

D. Excessive Detention Times

We saw no indication that CBPOs intentionally subjected travelers to unnecessarily lengthy periods of detention in secondary inspection areas. Rather, the amount of time travelers spent in secondary inspection was the product of several factors, chief among them:

- whether travelers arrived before or after the *Darweesh* order;
- whether travelers arrived at a land port of entry before the *Darweesh* order and could not be immediately returned to the contiguous country;
- in the case of voluntary withdrawals at U.S. airports before the *Darweesh* order, whether a return flight was readily available;
- CBP headquarters' decision to subject essentially all EO-affected travelers to secondary inspection before issuing national interest waivers, in an attempt to comply with the mechanics of the EO, despite accumulating court orders that effectively pre-determined the results; and
- whether (and at what point in time) DFOs possessed national interest waiver authority for a particular class of travelers (or, conversely, whether the Acting Commissioner himself had to approve each waiver, which was a lengthier process)

As shown in the "Average Processing Duration by Location" graph in Appendix C, travelers who attempted to enter the United States at land ports of entry were held for the longest period of time, an average of 5.7 hours. In contrast, travelers who sought admission at sea ports were detained an average of 3.3



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hours and travelers at U.S. airports were detained an average of 3.2 hours. By far the longest average detention time was at the San Ysidro land port of entry (an average of 11.5 hours per traveler).

The delay in processing travelers was due to CBP's inability to develop policies and procedures before the issuance of the EO, and the changing interpretation of the EO as a result of court orders and morphing guidance. While it is little comfort to those travelers who were detained in airports and land borders for unconscionable amounts of time, we find that CBP was cognizant of the need to process travelers as expeditiously as possible and attempted to overcome numerous hurdles to do so.

VII. Conclusion

Despite the inability to prepare for the EO, in consultation with DHS and interagency partners, CBP attempted to adjust to quickly-changing events, including court orders, by developing and providing implementation guidance to the field in a timely manner. It would have been difficult for any organization to perform seamlessly under those circumstances; CBP's operations are complex and widespread, and improvising policy and procedures on the fly led to delay and confusion.

Based on the information available to us, we found that CBPOs generally conducted themselves professionally. In some cases, travelers who had been inconvenienced by greater than normal delays commended CBPOs for their professional conduct. Nonetheless, we also noted that many travelers refused to speak with OIG investigators and one allegation of CBPO misconduct is currently under review.

We found that the secondary inspection process, which CBP used as a basis to adjudicate national interest waivers, did not appear to add anything to CBP's existing traveler vetting processes. Despite subjecting almost all EO-affected travelers to this procedure, CBP did not detect a single instance of terrorist threat because of the EO. Rather, the delays and resulting detentions were the result of DHS's and CBP's joint policy decision to maintain secondary inspection of travelers in an attempt to comply with the terms of the EO.

Activity in the federal courts broadly shaped the contours of CBP's implementation of the EO. The entry of the *Darweesh* order on Saturday night radically changed CBP's orientation: from presumptive denials of entry, CBP pivoted to processing national interest waivers for essentially all applicants who



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arrived at a U.S. port of entry. This and other court orders effectively prevented CBP from denying entry to travelers who reached the United States based solely on the EO. We found that, overall, by not “removing” EO-affected travelers, CBP generally obeyed the letter of the *Darweesh* order — except in limited instances when CBP continued to offer withdrawals at pre-clearance facilities and at land border ports of entry.

With respect to CBP’s international operations, we have greater concerns whether CBP reasonably obeyed provisions of the *Louhghalam* and *Mohammed* orders. The *Louhghalam* order directed CBP to notify airlines with flights arriving at Logan that individuals on those flights would not be detained or returned based solely on the EO. Although CBP provided this notice to the airlines, at the same time, CBP continued to insist that the visas of all of these travelers were invalidated by the EO, and CBP continued to issue “no board” instructions.

CBP’s narrow interpretation of the *Mohammed* order is also troubling. The order enjoined and restrained CBP from “removing, detaining, or blocking the entry of Plaintiffs, or any other person” from the seven countries with a valid immigrant visa because of concerns about the unconstitutional nature of the EO. While CBP was transparent with the Los Angeles court in its Thursday filing, its continued issuance of “no board” instructions to other similarly-situated passengers appears to us to have been questionable in light of paragraph 1 of the *Mohammed* order.

In sum, we found a number of instances where ambiguities or gaps in a court order, especially those touching on CBP’s international operations, were used to frustrate the overall spirit of the order. Although CBP acted commendably in many respects, this aspect of its implementation of the EO troubled us the most.

VIII. OIG Response to Management Comments on Our Report

In its “Management Response” of January 12, 2018, delivered over three months after we provided our draft report to the Department on October 6, 2017, DHS disagrees with our finding that CBP appeared to violate two court orders. We considered DHS’s comments but our conclusions remain unchanged.

We respectfully disagree with DHS’s claim that our report lacks evidence that CBP appears to have violated several court orders with respect to its



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international operations. In sum, we based our conclusion that CBP's continued issuance of no-board instructions to airlines effectively violated the *Louhghalam* and *Mohammed* orders on a plain reading of the text of those orders in light of CBP's actions, which are well evidenced in our report.

DHS also argues that CBP did not violate any court orders because no court "found noncompliance with their orders." But no court has performed the sort of review we did, nor has any one court seen the breadth of material we have seen on this issue. Moreover, DHS and CBP know that such a court review is very unlikely. That is because the *Washington v. Trump* order of Friday February 3, 2017, along with the government's mooted cases through settlement, meant that during the period under review, few, if any potential litigants had standing or sufficient awareness to bring a motion alleging violations of court orders.

We understand the legal argument DHS makes regarding the conflict DHS and CBP faced: the need to enforce the EO while at the same time complying with federal court orders that were invalidating large portions of the EO. This was undoubtedly very difficult. Indeed, overall, our report offers far more praise of CBP's efforts than criticism. But no Department of Government is free to circumvent court orders, even when they are exceptionally difficult to enforce. And, when we, as DHS's Office of the Inspector General, find that DHS has effectively violated a court order, regardless of purpose, we are statutorily obligated to report it. By the same token, we hope that the Department and CBP will find reason to reflect on our conclusions and consider ways to avoid the few, but significant, problems we identified in this report.

Finally, DHS and CBP rely heavily on the State Department's provisional revocation letter to defend their continued issuance of no-board instructions, even after *Louhghalam* and *Mohammed* essentially required CBP to process EO-affected travelers for national interest waivers and not block their arrival. As we noted, however, the court orders overrode the provisional revocation letter, especially because the orders were based on constitutional concerns. In short, it is our considered view that the issuance of no-board instructions violated the *Louhghalam* and *Mohammed* orders, whether or not the actions were based on the State Department letter, particularly where reliance on this letter also served to circumvent orders.



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Appendix A

Abbreviations Used in Report

AAAE	American Association of Airport Executives
APP	Admissibility and Passenger Programs
C1	Commissioner of CBP
CBP	U.S. Customs and Border Protection
CBPO	Customs and Border Protection Officer
DED	Deputy Executive Director
DFO	Director, Field Operations
DFW	Dallas Fort Worth International Airport
DHS	Department of Homeland Security
DOJ	Department of Justice
ED	Executive Director
EO	Executive Order #13769 <i>“Protecting the Nation From Foreign Terrorist Entry Into the United States”</i> (January 27, 2017)
FIS	Federal Inspection Station
IAD	Dulles International Airport (Port of Washington, D.C.)
ICE	U.S. Immigration and Customs Enforcement
IV	Immigrant Visa
LAX	Los Angeles International Airport
LPR	Lawful Permanent Resident
NIV	Non-Immigrant Visa
NTC	National Targeting Center
OCC	CBP Office of Chief Counsel
OFO	CBP Office of Field Operations
OGC	DHS Office of the General Counsel
OLC	DOJ Office of Legal Counsel
S1	Secretary of Homeland Security
Sea-Tac	Seattle-Tacoma International Airport
SIV	Special Immigrant Visa
TRO	Temporary Restraining Order
TTRT	Tactical Terrorism Response Team (division of CBP)
USCIS	U.S. Citizenship and Immigration Services
USRAP	United States Refugee Admissions Program



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Appendix B

Relevant Visa Categories

Immigrant Visas

Immediate Relative & Family Sponsored	Visa Category
Spouse of a U.S. Citizen	IR1, CR1
Spouse of a U.S. Citizen awaiting approval of an I-130 immigrant petition	K-3 *
Fiancé(e) to marry U.S. Citizen & live in U.S.	K-1 *
Intercountry Adoption of Orphan Children by U.S. Citizens	IR3, IH3, IR4, IH4
Certain Family Members of U.S. Citizens	IR2, CR2, IR5, F1, F3, F4
Certain Family Members of Lawful Permanent Residents	F2A, F2B
Employer Sponsored – Employment	
Employment-Based Immigrants, including (preference group): • Priority workers [First] • Professionals Holding Advanced	E1 E2



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Non-	Degrees and Persons of Exceptional Ability [Second] • Professionals and Other Workers [Third] • Employment Creation/Investors [Fifth] • Certain Special Immigrants: [Fourth]	E3, EW3 C5, T5, R5, I5 S (many**)
	Religious Workers	SD, SR
	Iraqi and Afghan Translators/Interpreters	SI
	Iraqis Who Worked for/on Behalf of the U.S. Government	SQ
	Afghans Who Worked for/on Behalf of the U.S. Government	SQ
	Other Immigrants	
	Diversity Immigrant Visa	DV
	Returning Resident	SB

Immigrant Visas

Purpose of Travel	Visa Category
Athlete, amateur or professional (competing for prize money only)	B-1

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Au pair (exchange visitor)	J
Australian professional specialty	E-3
Border Crossing Card: Mexico	BCC
Business visitor	B-1
CNMI-only transitional worker	CW-1
Crewmember	D
Diplomat or foreign government official	A
Domestic employee or nanny - must be accompanying a foreign national employer	B-1
Employee of a designated international organization or NATO	G1-G5, NATO
Exchange visitor	J
Foreign military personnel stationed in the United States	A-2 NATO1-6
Foreign national with extraordinary ability in Sciences, Arts, Education, Business or Athletics	O



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Free Trade Agreement (FTA) Professional: Chile, Singapore	H-1B1 - Chile H-1B1 - Singapore
International cultural exchange visitor	Q
Intra-company transferee	L
Medical treatment, visitor for	B-2
Media, journalist	I
NAFTA professional worker: Mexico, Canada	TN/TD
Performing athlete, artist, entertainer	P
Physician	J , H-1B
Professor, scholar, teacher (exchange visitor)	J
Religious worker	R
Specialty occupations in fields requiring highly specialized knowledge	H-1B
Student: academic, vocational	F, M
Temporary agricultural worker	H-2A



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Temporary worker performing other services or labor of a temporary or seasonal nature.	H-2B
Tourism, vacation, pleasure visitor	B-2
Training in a program not primarily for employment	H-3
Treaty trader/treaty investor	E
Transiting the United States	C
Victim of Criminal Activity	U
Victim of Human Trafficking	T
Nonimmigrant (V) Visa for Spouse and Children of a Lawful Permanent Resident (LPR)	V

Important Notes:

***K Visas** – Listed with immigrant visas because they are for immigration related purposes.

About this chart - This chart is a list of many immigrant visa categories, but not every immigrant visa category.

****Refer to the Foreign Affairs Manual, [9 FAM 502.1](#) for a listing of all immigrant visa categories**



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Source: <https://travel.state.gov/content/visas/en/general/all-visa-categories.html>



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Appendix C

Methodology to Establish the Dataset Used in the Report

CBP provided DHS OIG a detailed spreadsheet of 3,024 traveler encounters⁴⁷ involving individuals from Iraq, Iran, Syria, Sudan, Somalia, Libya, and Yemen at U.S. ports of entry or pre-clearance locations overseas from January 27, 2017 through February 4, 2017. The spreadsheet contained over 25 fields of data for each traveler, drawn from three CBP databases: SIGMA, CSIS, and TECS. CBP's document production also contained records and emails concerning national interest waivers for many of these travelers. OIG maintains its own access to TECS and was able to query the system as needed with respect to specific travelers. Using this capability, and through many clarifying discussions with CBP, we were able to refine our methodology and make determinations about travelers who were processed under the EO, in contrast to those who were not affected by the EO.

To determine the number of encounters and unique individuals affected by the EO, DHS OIG made the following exclusions from the original dataset of 3,024 travelers:

- 1) Excluded 779 individuals who were processed before the EO took effect on January 27.
- 2) Excluded 210 individuals who were processed after CBP stopped implementing the EO on February 3.
- 3) Excluded 50 individuals who were encountered but were not seeking admission to the United States and therefore were not in scope of the EO.
- 4) In general agreement with CBP's analysis, after verification, we excluded approximately 22 individuals whose processing and disposition were not affected by the EO.
- 5) Excluded duplicate records.

⁴⁷ "Encounter" is used here to refer to a CBP officer processing a traveler at primary inspection. The traveler may have been admitted to the United States from primary or referred for secondary inspection.



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- 6) Identified unique individuals who were encountered more than once while the EO was in effect.

OIG determined that one encounter in the dataset provided by CBP was a combination of three encounters; these were separated, for a total of 3,026 encounters. Of these, DHS OIG identified 1,976 unique individuals, involved in 1,978 encounters, who were affected⁴⁸ by the EO. The table below details our analytical steps in obtaining the final data set.

Table 1: Establishing the Dataset of Individuals Affected by the EO

Description	Number
Records (Encounters) Received	3,024
Correction for 3 Records That Were Merged Into 1	2
Processed Before the EO Took Effect	-779
Processed After CBP Stopped Implementing the EO	-210
Not Seeking Admission to the U.S.	-50
Processing and Disposition Not Affected by the EO	-22
Duplicate Records	-3
Records Subtracted Twice ⁴⁹	16
Total # of Encounters	1,978
Repeat Encounters of Same Individual	-2
Total # of Unique Individuals Affected by EO	1,976

Each of the steps taken to establish the dataset is discussed below.

⁴⁸ “Were affected” is used here to refer to travelers whose processing or disposition was related to the EO. For example, “affected” could refer to either of the following: a traveler was referred to secondary who otherwise would have been admitted from primary; or a traveler was refused who otherwise would have been admitted.

⁴⁹ Sixteen individuals were subtracted twice because they fell into two categories that were excluded from the dataset. Therefore, they were added back in once to account for the overlap.



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1) Excluding Individuals Processed Before the EO Took Effect on January 27

President Trump signed the EO at 4:43 p.m. on January 27. We excluded from the dataset 476 individuals who were encountered on January 27 but whose processing was complete prior to 4:43 p.m.

At 9:00 p.m. on January 27, CBP headquarters held a teleconference with CBP leadership in the field and provided the first nationwide verbal guidance, effective immediately, on implementing the EO. The teleconference was scheduled for one hour. We reviewed the records for individuals who were referred to secondary from 9 p.m. to 10 p.m. and found that the EO was first mentioned in records of individuals who were referred at 9:57 p.m. and 10:01 p.m. We therefore included in the dataset any individual encountered on or after 9:57 p.m. on January 27 (until CBP stopped implementing the EO on February 3).

For individuals encountered after 4:43 p.m., when the EO was signed (or whose processing was not complete by 4:43 p.m.), and before 9:57 p.m., when CBP officers began implementing the guidance received on the 9 p.m. teleconference, we made the following determinations.

- We excluded 71 individuals who were referred to secondary inspection before 6:21 p.m. on January 27 because according to CBP, of the individuals who were ultimately affected by the EO, the first referral to secondary took place at 6:21 p.m. The individual was referred for reasons unrelated to the EO; while the individual was in secondary, CBP began to implement the EO, and the individual became affected.
- We reviewed inspection records for each of the 43 individuals who were referred to secondary from 6:21 p.m. to 9:57 p.m. We excluded 41 whose records did not mention the EO, and included two (including the individual referenced above) who were referred to secondary for reasons unrelated to the EO but became affected while in secondary.
- We excluded from the dataset 191 individuals who were admitted from primary after 4:43 p.m. but before 9:57 p.m. on January 27. The disposition of those 191 individuals (admitted from primary) suggests that the EO did not affect their processing; and, as described above, a review of records of individuals who were referred to secondary from

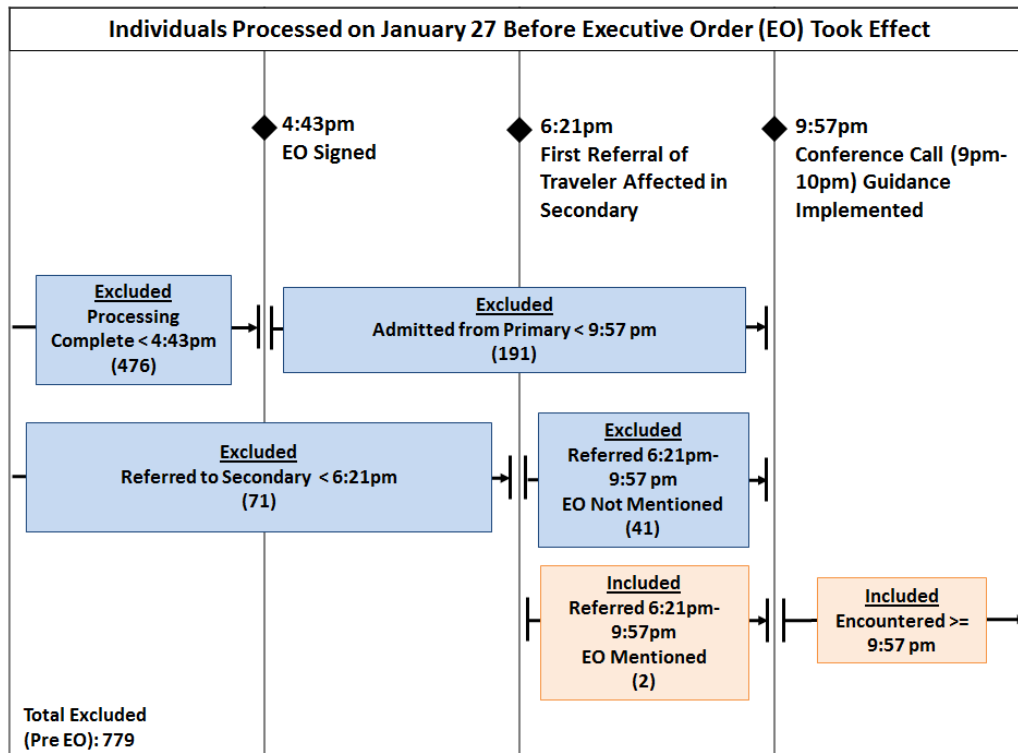


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9 p.m. to 10 p.m. indicates that CBP began implementing the EO around 9:57 p.m.

The graphic displays the categories of individuals who were excluded and included based on the criteria described above.



2) Excluding Individuals Encountered After CBP Stopped Implementing the EO on February 3

On February 3 at approximately 7:00 p.m., the United States District Court, Western District of Washington issued a temporary restraining order prohibiting the federal government from enforcing sections 3(c), 5(a), 5(b), 5(c), and 5(e) of the EO.

According to CBP, the last individual affected by the EO was referred to secondary at 8:18 p.m. on February 3. We therefore excluded all individuals referred after 8:18 p.m. on February 3 from the dataset, with one exception. We reviewed the records for all individuals referred after 8:18 p.m. on February 3 who were not admitted to the United States, and we found that the records for



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one individual, who was encountered on February 4 at 5:42 p.m., indicated that the individual was not admitted because his visa had been previously revoked pursuant to the EO. We included that individual in our dataset.

3) Excluding Individuals Not Seeking Admission to the United States

The data provided by CBP included 50 records where individuals encountered by CBP were not seeking admission to the United States. This occurred primarily at northern border land ports for three reasons. First, foreign nationals in Canada came to a U.S. port of entry to satisfy a Canadian immigration requirement imposed in certain circumstances to temporarily leave Canada, for example when applying for certain adjustments in status. This is a routine practice known as “flagpole.” The individuals sought only to leave Canada momentarily and did not seek entry to the United States. Second, some individuals took a wrong turn and inadvertently came to a U.S. port of entry. Third, a few individuals were already in the United States and came to a CBP deferred inspection site to receive an I-94 Arrival and Departure Record.

Additionally, nine individuals were crewmembers without visas who were detained on board, a routine practice.

We excluded these 50 individuals from our dataset.

4) Excluding Individuals Whose Processing and Disposition Were Not Affected by the EO

The processing and disposition (i.e., CBP’s decision regarding the traveler’s entry into the United States) of each encounter that occurred from January 27 through February 3 were not necessarily affected by the EO. Specifically, 14 individuals were processed for Expedited Removal Credible Fear; three individuals were refused entry under Section 212(a)(7)(A)(i)(I) Immigrant without Documents, of the Immigration and Nationality Act, as amended; four individuals were paroled and given Notices to Appear; and one individual withdrew his application for admission for reasons unrelated to the EO.⁵⁰ The processing and disposition of these encounters would have been the same with or without the EO, according to CBP. Of the 22 encounters, we reviewed the records for 19 that occurred while the EO was in effect. The records indicate

⁵⁰ CBP’s spreadsheet indicated that this individual was in scope. However, the notes in TECS indicated this was an LPR who had never established his residency requirements in the U.S.
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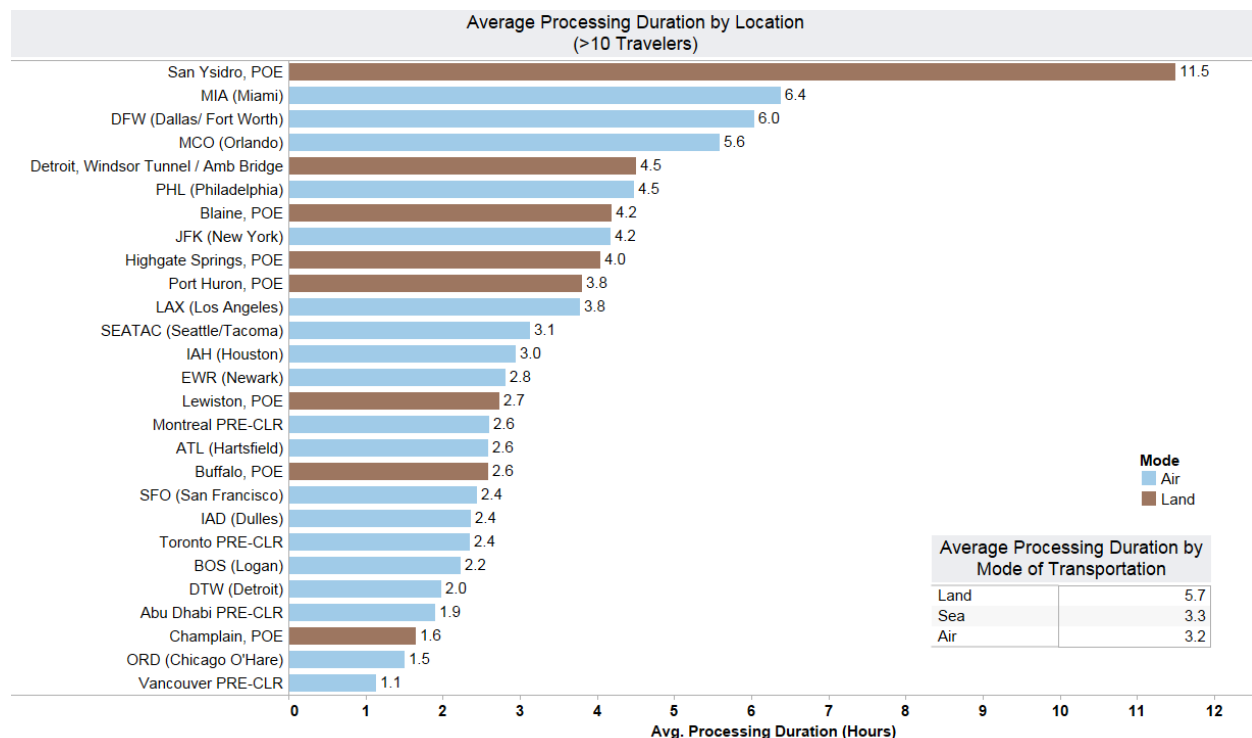
that the processing and disposition of these individuals were not influenced by the EO. We therefore excluded them from our dataset.

5) Excluding Duplicate Records

We excluded three duplicate records for individuals who were in the original dataset twice for the same encounter.

6) Identifying Unique Individuals Encountered More than Once

Two individuals in the dataset traveled to the United States more than once while the EO was in effect, resulting in multiple encounters for those individuals. The final dataset therefore contains 1,978 encounters for 1,976 unique individuals.⁵¹



⁵¹ For the encounter-based analyses such as disposition and date of encounter (in contrast to traveler-based analyses such as country of citizenship), for travelers with multiple encounters we retained in the dataset the refusals that occurred on the latest date.



Homeland Security

January 12, 2018

MEMORANDUM FOR: John V. Kelly
Acting Inspector General

FROM: Jim H. Crumpacker, CIA, CFE
Director
Departmental GAO-OIG Liaison Office

A handwritten signature in black ink, appearing to read "Jim H. Crumpacker".

SUBJECT: Management Response to Draft Report OIG-18-XX: "DHS Implementation of Executive Order # 13,769 *Protecting the Nation From Foreign Terrorist Entry Into the United States* (January 27, 2017)"

Thank you for the opportunity to review and comment on the subject draft report (Report). We appreciate the Office of Inspector General's (OIG) acknowledgement that implementing new policies under compressed timelines is difficult under any circumstances. The U.S. Department of Homeland Security (DHS) continues to be proud of the calm, professional, and diligent response of its workforce in implementing Executive Order 13,769 and welcomes the OIG's recognition of that response. However, we have significant concerns about the Report, which contains a number of legal and factual inaccuracies and is methodologically flawed. We spent a significant amount of time highlighting these points with the OIG so that your office would have a full understanding of the inaccuracies in the report. Unfortunately, important inaccuracies remain. So, it is in the interest of accuracy that this management response focuses on key concerns with the Report and its findings, particularly with respect to the Government's compliance with court orders.

It is important for Congress and the public to know that DHS did not countenance any violation of a court order, including those specifically discussed in this Report. Any implication or statement to the contrary is unfortunate and misleading. But the Report does provide an opportunity to explain how federal officials must act to comply with *all* of the applicable law in a fast-paced and evolving environment in which all three branches of the federal government have acted—a requirement that DHS met in the early days of implementing Executive Order 13,769.

When executive branch officials are presented with an Executive Order from the President, they must comply with its instructions. There is an exception, of course, when a federal court issues an order instructing federal officials not to comply with those instructions. On this, DHS and the OIG agree. But the Report fails to recognize the obligations incumbent upon executive branch officials in those situations in which a court order restrains some, but not all, activity under an Executive Order. In such situations, executive branch officials do not have the luxury of complying with a court's order and ignoring wholesale the Executive Order. Instead, those officials must fully comply with the court's order *and also*, to the extent not prohibited otherwise by the court order, comply with the Executive Order.

As explained in more detail below, the OIG fails to understand this. Rather, the OIG suggests that DHS should not only comply with the terms of the court's order, but also divine "the overall spirit of the [court] order" (Rep. at 71) and disregard the Executive Order so that the officials may comply with the spirit so divined. None of the courts referenced in the Report found noncompliance with their orders. Not one. But the OIG, presumably based on its idiosyncratic understanding of what constitutes the spirit of those orders, finds noncompliance itself. Notwithstanding the OIG's apparent second-guessing of both the executive and judicial branches on this issue, we believe that the courts, which had the opportunity to evaluate legal arguments and weigh competing interests in crafting the terms of their orders, were better-positioned to determine whether DHS complied with the terms of the orders they issued.

So, for the benefit of the OIG and, in particular, any persons reading the Report, we start with the basics. When implementing the Executive Order, DHS and its officers were required to and did comply with four binding authorities. The first, of course, is the Constitution, which sets out the structural authorities, responsibilities, and protections that undergird the other authorities. The second is the Immigration and Nationality Act (INA), passed by Congress, which includes many grounds of inadmissibility in 8 U.S.C. § 1182. The Executive Order itself is a third authority, which implemented INA provisions on entry that are assigned to the President. A fourth source of authority took the form of several federal court orders, with which DHS was obligated to comply, that were issued as a result of challenges to the Executive Order. As courts issued these orders, the obligation of federal officials remained consistent: to follow the law, including the Executive Order and the INA where not in conflict with the federal court orders.

For executive branch employees, compliance with Executive Orders is not optional. Such orders, which have been issued by Presidents since the country's founding, are widely recognized as having the force and effect of law. *See, e.g., City of Albuquerque v. U.S. Dep't of Interior*, 379 F.3d 901, 913 (10th Cir. 2004) ("If an executive order has a specific statutory foundation it is given the effect of a congressional statute."); *Farkas v. Texas Instrument, Inc.*, 375 F.2d 629, 632 (5th Cir. 1967) (Executive Order "to be accorded the force and effect given to a statute enacted by Congress"); *Farmer v. Phila. Elec. Co.*, 329 F.2d 3, 7 (3d Cir. 1964) ("There are instances when the President issues proclamations and orders . . . pursuant to a mandate or a delegation of authority from Congress. In such instances the proclamations [and] orders . . . have the force and effect of laws."); *Legality of the International Agreement with Iran and Its Implementing Executive Orders*, 4A Op. O.L.C. 302, 307 (1981) ("A valid Executive Order has the force of a federal statute . . ."); *see also* 32 Charles Alan Wright & Charles H. Koch, Jr., *Federal Practice and Procedure* § 8278 (2017) ("Executive orders are presidential directives issued to federal government agencies or officials. Since these executive orders bind the agencies, they may have substantial effect on the public.").

The Executive Order at issue in the Report had a specific statutory foundation: Section 212(f) of the INA. Section 212(f) provides that

[w]henver the President finds that the entry of any aliens or any class of aliens into the United States would be detrimental to the interests of the United States, he may by proclamation, and for such period as he shall deem

necessary, suspend the entry of all aliens or any class of aliens as immigrants or nonimmigrants, or impose on the entry of aliens any restrictions he may deem to be appropriate.

The President acted on this authority clearly conveyed by Congress.¹ Imagine if executive branch officials decided not to act under the Executive Order. Not only would those officials defy the President, but also the Congress, for it was Congress that gave the President this particular authority. Congress does not provide such powers lightly, and it certainly does not do so with the idea that lower-level executive branch officials can disregard the President's instructions under that authority—even when faced with the uncomfortable task of complying with both court orders and (to the extent possible, based on the scope of any applicable court orders) the President's order.

This is the difference between the OIG and DHS views: The Department is of the view that if a court restrains some conduct under a President's Executive Order, but not all of it, DHS officials must comply with the Executive Order to the extent it is not specifically enjoined. The logic of the OIG, however, would have Department officials comply with the court orders and then some—regardless of whether that results in a failure to act under the Executive Order in ways not prohibited by the court.

At several points in the Report, the OIG criticizes certain actions of DHS officials, but it does not suggest what alternative actions the Department should have taken. For example, in light of a court order restraining DHS from removing certain aliens from the United States, the Report criticizes the Department for taking steps to prevent the travel of other aliens *to* the United States when those individuals did not have valid visas. But there is no indication of what DHS should have done instead (that is, aside from exactly what the Department did in staying its hand from removing the individuals, just as the court ordered). Should DHS have ignored the Executive Order and facilitated the travel of such aliens—without valid visas—to the United States? Should it have done this even though the applicable federal statute, at 8 U.S.C. § 1182(a)(7), deems such individuals inadmissible? Doing so would have violated federal statutory law when no court order required as much. Although U.S. Customs and Border Protection (CBP) officials had to consider all of this in what the OIG acknowledges was a pressure-filled environment (due to protestors, mounting lawsuits, and dynamic travel throughout the world that simply did not pause), the Report offers no alternative course of action—despite the many months of reflection afforded that office. Such is the luxury of criticism without the burden of responsibility to execute.

¹ And in case there was any doubt for executive branch officials reading the instructions of the Executive Order, the Department of Justice, through its Office of Legal Counsel (OLC), had approved the legality of the Executive Order. OLC is specifically authorized to advise on the legality of Executive Orders. *See* 28 C.F.R. § 0.25(a), (b); *see also* 8 U.S.C. § 1103(a)(1) (stating that determinations and rulings by the Attorney General “with respect to all questions of law shall be controlling”). Consistent with these authorities and longstanding practice, Department officials, like all executive branch officials, treat OLC opinions as binding. Perhaps unfamiliar with OLC's practices with regard to memoranda on the form and legality of executive orders (though not unknowing—DHS staff specifically told the OIG about them), the OIG (of Homeland Security) gratuitously criticizes the Office of Legal Counsel (of the Department of Justice) for the memorandum's “dearth of analysis” (Rep. at 9).

The Report asserts that “[b]y preventing individuals subject to the [Executive Order] from reaching the United States, through various methods, CBP effectively circumvented provisions of these orders.” This conclusion is wrong for reasons already stated and further described below. Before taking each order in turn, however, and in order to properly understand the Government’s compliance, we highlight a misunderstanding and misperception woven throughout the Report as related to the Department’s handling of overseas travelers.

Specifically, as the Report acknowledges, on January 27, 2017, the State Department issued a prudential revocation of “all valid nonimmigrant and immigrant visas of nationals of Iraq, Iran, Libya, Somalia, Sudan, Syria and Yemen” subject to limited exceptions for diplomats. This State Department revocation letter rendered every person with a previously valid visa as without a visa and inadmissible on that legal basis.² Simply stated, a foreign national from an Executive Order-affected country no longer had a valid visa as of January 27, and was therefore not admissible to the United States.³ The requirement to have a valid visa to enter the country is a bedrock principle in American immigration law. None of the court orders described by the OIG took the extraordinary action of evaluating or overriding the visa decisions by the State Department. Until the *Washington* order on February 3, 2017,⁴ none of the preceding orders directed or required the State Department to rescind or change its determination regarding the visas—nor did the State Department do so. Yet the Report faults CBP for treating these individuals as they were in fact and law: inadmissible to the United States. It was the law that determined this inadmissibility—not some effort to “frustrate the overall spirit” of court orders—and guided CBP’s actions. Suggestions to the contrary are simply incorrect and reflect a fundamental misunderstanding that runs throughout the Report. As described more fully below, the Report offers an inaccurate depiction of the court orders and DHS actions, and the Report misperceives the extent to which the law applied differently to those aliens who were in the United States and those aliens who were abroad.

Although we review below the few cases mentioned in the Report, it is important to recall that *dozens* of lawsuits were filed against the Department and required responses and, when court orders were issued, compliance.

Darweesh v. Trump (U.S. District Court for the Eastern District of New York)

The *Darweesh* case involved a challenge brought by Hameed Khalid Darweesh and Haider Sameer Abdulkhaleq Alshawi. On the evening of Saturday, January 28, 2017, the court ordered that the Government was “enjoined and restrained from, in any manner or by any means, removing individuals with refugee applications approved by U.S. Citizenship and Immigration Services [(USCIS)] as part of the U.S. Refugee Admissions Program [(USRAP)], holders of

² In other words, although the visas possessed by these individuals appeared, on their face, to be valid, the Department of State’s revocation letter rendered them invalid by operation of law despite the fact that the visas were not physically cancelled.

³ Some statutory provisions, not applicable in this context, allow for certain exceptions.

⁴ As explained in the Report, the February 3, 2017 order halted the government’s enforcement of Executive Order 13,769 nationwide.

valid immigrant and non-immigrant visas, and other individuals from Iraq, Syria, Iran, Sudan, Libya, Somalia, and Yemen, legally authorized to enter the United States.” The Report acknowledges that very shortly after receiving a clarification that the Order had nationwide effect, CBP leadership ordered its employees to “suspend all departures of those found inadmissible under the Executive Order including those who wished to voluntarily depart.” This directive was designed to ensure that there were no removals, as ordered by the court. To further reinforce this, CBP issued additional guidance later that evening: “In any event, no alien subject to the Executive Order may be subject to Expedited Removal or another immediate form of removal. For any alien currently in CBP custody who had previously been processed for Expedited Removal and not yet removed, please re-process according to this guidance.” The *Darweesh* order forbade “removing individuals,” and CBP’s guidance, in turn, explicitly forbade the removal of any person subject to the Executive Order. As the Report acknowledges, CBP did not seek to remove anyone from the United States based on the Executive Order after the *Darweesh* order. CBP thus complied with the order. The court made no finding that CBP failed to comply with its order. Finding no evidence of a removal contrary to this order of the court, the Report ought to have concluded that CBP complied fully with the *Darweesh* order.

Instead, the Report pivots to an issue not addressed by the court, faulting CBP for continuing to work with air carriers with respect to recommendations they not board inadmissible aliens, and finding individuals at overseas preclearance facilities inadmissible. Neither issue relates to the limited temporary remedy actually at issue in the *Darweesh* order—removals. It is axiomatic that in order to be *removed* from the United States one must first be *in* the United States.⁵ Thus the reading of the order that the Report posits is nonsensical. The Government interpreted the *Darweesh* order reasonably and consistent with its language: barring removals from the United States, but not prohibiting all other actions under the Executive Order. Nothing in the court order prohibited CBP’s overseas actions, which included providing recommendations to the carriers with respect to aliens inadmissible under the INA.

⁵ It is no surprise that the law recognizes a distinction between removing someone who is *in* the United States and the treatment of someone who is not yet in the United States. See, e.g., 8 U.S.C. § 1227(a) (“Any alien (including an alien crewman) *in and admitted to the United States* shall, upon the order of the Attorney General, *be removed* if the alien is within one or more of the following classes of deportable aliens . . .” (emphasis added)); *id.* § 1231(a)(1)(A) (“Except as otherwise provided in this section, *when an alien is ordered removed*, the Attorney General shall remove the alien *from the United States* within a period of 90 days . . .” (emphasis added)); *id.* § 1231(a)(5) (“If the Attorney General finds that an alien *has reentered the United States illegally after having been removed* or having departed voluntarily, *under an order of removal*, the prior order of removal is reinstated from its original date and is not subject to being reopened or reviewed, the alien is not eligible and may not apply for any relief under this chapter, and *the alien shall be removed* under the prior order at any time after the reentry.” (emphasis added)); *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 212 (1953) (“[A]liens who have once passed through our gates, even illegally, may be expelled only after proceedings conforming to traditional standards of fairness encompassed in due process of law. But an alien on the threshold of initial entry stands on a different footing . . .” (citations omitted)); *Tellez v. Lynch*, 839 F.3d 1175, 1178 (9th Cir. 2016) (“[T]he section of the INA under which Tellez was first returned to Mexico—a provision that authorizes the ‘expedited *removal* of inadmissible arriving aliens,’ 8 U.S.C. § 1225 (emphasis added)—necessarily implies an initial entry. The verb remove is ordinarily defined as ‘[t]o move from a position occupied.’ *It makes no sense to speak of removing someone who has not yet entered or never occupied a position*—say, removing Clint Eastwood from the papacy or removing a colony from Mars. *Entry implies movement in; removal implies movement out.* Tellez must have first entered U.S. territory in order to be removed from it. Having entered once, her second entry was a reentry.” (emphasis added) (citations omitted)), *cert. denied*, 2017 WL 3130762 (Oct. 2, 2017).

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Furthermore, the Department did not hide what it was doing. The Report acknowledges that DHS was transparent at the time in its position, having noted in a press statement of January 29, 2017: “We are also working closely with airline partners to prevent travelers who would not be granted entry under the executive order[] from boarding international flights to the U.S. Therefore, we do not anticipate that further individuals traveling by air to the United States will be affected.” CBP publicly posted the number of individuals with respect to whom it made recommendations that carriers not board on its website. In a press conference on January 30, 2017, the Secretary of Homeland Security reiterated the intent to continue recommending to carriers that they not board individuals whose visas were revoked.

In addition to these public statements, an examination of the public court docket in *Darweesh* demonstrates that the court was aware that the parties initially disagreed about the scope of the court’s order, and the government filed with the court a copy of the State Department’s revocation letter in order to clarify that issue. The docket also demonstrates extensive litigation over who fell within the scope of the court’s order. Indeed, the parties eventually settled this matter with the issuance of a letter to all individuals whose visas had initially been cancelled at a port of entry as a result of the implementation of Executive Order 13,769, explaining that they were entitled to receive a travel document under Executive Order 13,780, issued on March 3, 2017. There is no question that the court was well aware of the circumstances and activities of the Department, and those activities were subjected fully to the adversarial process overseen by the court. Yet the court found no violation of its order.

Similarly, permitting individuals to withdraw their application for admission when they were inadmissible, including at a preclearance location, did not effectuate a removal from the United States. The “Hobson’s choice” that the Report points to is not one of CBP’s creation. Aliens may be permitted at any time to withdraw their request to enter the United States, known as an application for admission, and depart immediately. That decision must be made voluntarily, and is often made in lieu of removal proceedings. It may be a difficult decision for a traveler to make on whether to seek procedural protections that may be available through removal proceedings while risking the detention and attendant bar on reentry, or instead to voluntarily withdraw one’s application. Yet this is the decision that the law, and not DHS policy, puts before aliens determined to be inadmissible when they arrive. The Report acknowledges that in instances where individuals who could be considered for a waiver after the *Darweesh* order but had recently withdrawn their applications for admission, CBP officials actively attempted to locate such individuals.⁶ Thus, there is no question that permitting individuals, particularly when they were overseas and not even facing removal, to withdraw their applications for admission was entirely consistent with the *Darweesh* order.

⁶ The Report outlines one instance of the extraordinary efforts that officers at Dulles took. Upon learning of the *Darweesh* order, the officers took steps to actually prevent a Turkish Airlines flight already on the tarmac from departing. On board was an individual who had withdrawn his application for admission after learning he was inadmissible given the provisional revocation of his visa. The passenger was subsequently given appropriate waivers and admitted to the United States. Instances such as this one demonstrate the exceptional efforts CBP made to comply with the *Darweesh* order.

Indeed, the Report does not take into account (nor recognize) these nuances of immigration law, which compounds the errors in the Report's interpretation of the court order in *Darweesh*. For instance, the Report consistently and inaccurately characterizes all individuals found inadmissible throughout the period of the Executive Order's implementation as "refusals." In its charts characterizing individuals who were "refused" after the issuance of the *Darweesh* order, the Report acknowledges that "CBP offered withdrawals" to each of the individuals but continues to portray them as "refusals." "Refusal," however, is not a technical term found in the immigration laws. The Report's use of the term allows the OIG to gloss over the legal details that govern aliens' attempts to enter the United States. Moreover, the term "refusal" gives the misleading impression that such individuals were in fact removed contrary to *Darweesh*. But the language of the Report itself, acknowledging that each individual withdrew their applications, contradicts this very conclusion. Again, the Report does not identify any circumstance in which an individual was improperly removed. The Report faults DHS for continuing to enforce "the [Executive Order] as if the national interest waiver option was unavailable," a comment suggesting that, in the view of the OIG, DHS should have simply granted national interest waivers to all travelers. The limited terms of *Darweesh* did not require such action, and the Government did not receive an order restraining all activity under the relevant provisions of the Executive Order until the *Washington* court's order on February 3, 2017. The Department fully complied with that order, just as it fully complied with the earlier orders.

Finally, we note that although the Report finds no instance where an individual was removed after the issuance of the *Darweesh* Order, the Report confusingly recounts the overlapping orders as they came into CBP by addressing CBP's compliance with various orders under disparate headings in the Report. The discussion of CBP's compliance with the *Darweesh* order is sprinkled throughout the Report without clear delineation as to which order was applicable to a particular set of facts. The confusing nature of the presentation throughout the Report is important because it contributes to a clouded suggestion of noncompliance, rather than clearly addressing the applicable law and facts associated with each order.

Louhghalam v. Trump (U.S. District Court for the District of Massachusetts)

With respect to the *Louhghalam* court order, the Report states that CBP "circumvented" the order. Additionally, in a November 20, 2017, letter to Congress, the OIG goes further, claiming that "by issuing 'no board' instructions to airlines" CBP was "in violation" of the *Louhghalam* Order. That determination is not consistent with what was actually required by the order. That order, issued on January 29, 2017, required that the Government

- (a) Shall limit secondary screening to comply with the regulations and statutes in effect prior to the Executive Order, including 8 U.S.C. 1101(a)(13)(C);
- (b) Shall not, by any manner or means, detain or remove individuals with refugee applications approved by [USCIS] as part of the [USRAP], holders of valid immigrant and non-immigrant visas, lawful permanent residents, and other individuals from Iraq, Syria, Iran, Sudan, Libya, Somalia and Yemen who, absent the Executive Order, would be legally authorized to enter the United States;
- (c) [the Order is served on the Marshals]; and
- (d) Customs and Border Protection shall notify airlines that

have flights arriving at Logan Airport of this Order and the fact that individuals on these flights will not be detained or returned based solely on the basis of the Executive Order.

The Report takes this plain language, which explicitly includes a reference to Logan Airport, and appears to criticize the Government for interpreting “all provisions of the *Louhghalam* order to apply only to Logan and international flights destined for Logan.” This conclusion fails to recognize that the *Louhghalam* order was not issued in a vacuum. The *Darweesh* order already prohibited nationwide much of what was enjoined by the second paragraph of the *Louhghalam* order. Because of that, the guidance that CBP had already issued to comply with the *Darweesh* order would largely bring compliance with the order in *Louhghalam* beyond its application at Logan. Accordingly, one can discern little about the Government’s view on the scope of the *Louhghalam* order from actions discussed in the Report given that it was already complying with *Darweesh*, and any supposed effort to minimize that order would have been futile in light of the *Darweesh* order. In addition, the Report acknowledges that the *Louhghalam* order “could fairly be read to mean that CBP was only blocked from detaining or removing otherwise admissible Executive Order-affected travelers once they arrived in the United States.” Thus, DHS did precisely what was required; it complied with a logical and plain reading of both the *Louhghalam* and the *Darweesh* orders.

The Report seems to fault the practice of sending individuals to secondary for waiver consideration, implying contravention of the first paragraph of the order. Yet in other places the Report criticizes DHS for not using the waiver provision more broadly. The Report also acknowledges that secondary inspection is a routine mechanism for referring individuals out of the initial inspection area (when they need greater processing time) and to a place where they can be more appropriately processed. It is again unclear what the OIG would have had DHS do differently.

The Report’s assertion that CBP should have immediately ceased its coordination with the carriers—coordination that the OIG views as an effort to circumvent the Court orders—is at odds with other facts in the Report. Indeed, in its letter to Congress, the OIG goes one step further and claims that CBP’s actions were in “violation of an order issued by a Boston court.” This simply cannot be squared with the Report, the language of the order, or the very facts the OIG recounts. As explained above, pursuant to the action of the State Department, no person overseas and subject to the Executive Order had a valid visa. Moreover, as the Report acknowledges, CBP interaction with the carriers is one of recommendation, not requirement, and at least one carrier did not follow CBP’s recommendations and transported individuals to Logan Airport. Not one of these individuals, even if a recommendation had been made to a carrier, was detained or removed from the United States. It is unclear on what basis the OIG concluded that DHS actions were in contravention of that order.

Mohammed v. United States (U.S. District Court for the Central District of California)

The Report also questions the Government’s response to the *Mohammed* order. This case involved a challenge brought by Badr Dhaifallah Ahmed Mohammed and twenty-eight other

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named plaintiffs. On January 31, 2017, a federal court in Los Angeles issued an order that, in pertinent part, stated that the Government defendants were:

ENJOINED AND RESTRAINED from enforcing Defendant President Donald J. Trump's January 27, 2017 Executive Order by removing, detaining, or blocking the entry of Plaintiffs, or any other person from Iran, Iraq, Libya, Somalia, Sudan, Syria and Yemen with a valid immigrant visa[.]

The Report opines that “[t]he language ‘block the entry’ fairly meant that CBP could not use its international operations to prevent Executive Order-affected travelers from boarding flights bound for the United States.” Yet the Report does not recognize that the Government took careful steps not only to comply with the terms of the court’s order, but also to ensure that the court knew of the Government’s actions in light of that order. The Government filed a Notice with the court explaining its view of the court’s order. The Government’s filing provided all of the details outlined in the Report—the Government did not believe that the court’s order reached all individuals overseas because their visas had been revoked. The Government’s filing also cited the revocation letter issued by the State Department and explained that “Defendants interpret Section 1 of this Court’s order to prohibit blocking entry of ‘any other person’ subject to the Executive Order only if the person possesses a ‘valid immigrant visa.’” The Government clearly stated its position that no one overseas had such a visa, as all such visas had been all provisionally revoked and were not valid for travel or admission. The Government was direct on the purpose of the filing of the Notice: “Should the Court wish to modify this or other aspects of its Order, Defendants respectfully request the opportunity to provide briefing on the schedule set by the Court.” And contrary to the Report’s contention that the *Washington* Order effectively mooted the *Mohammed* court’s consideration of this issue, that case continued to be actively litigated. At a status conference on February 21, 2017, the court found that the temporary restraining order should not be extended both because of the *Washington* order and because, as the court stated, “Plaintiffs’ counsel [has been unable] to identify any named plaintiffs with validly issued immigrant visas who were currently being denied the ability to immigrate to the United States.” Thus, the contention that the Government failed to comply with the court’s order is inconsistent with the *Mohammed* court’s own ruling on the matter. Undoubtedly, the issuing court managing the adversarial process is best positioned to determine the intent of the court.

Aziz v. Trump (U.S. District Court for the Eastern District of Virginia)

In its discussion of *Aziz*, the Report offers a broad and unsubstantiated claim—that the “actions of the government in the Mohammed case were not isolated. In fact, they spanned multiple courts and plaintiffs.” While it is unclear as to which actions the Report is referring with this assertion, the Report pivots to a discussion of language, taken out of context, in the *Aziz* hearing. It appears that the Report criticizes the Government for attempting to resolve certain cases that were in litigation. But the Report’s criticism is at odds with what the *Aziz* Court advanced, repeatedly urging the Government to resolve as many of the cases arising out of the Executive Order as it could at a hearing on February 3, 2017. The Government, which was speaking only for the *Aziz* matter as it made clear at the outset, explained: “I take issue with the fact on behalf of the federal government that the commonwealth is suggesting we’re mooting cases out

strategically. Everyone in this courtroom knows very well we have dozens of these across the country. Some of them we are litigating; some of them we're not." Thus, the Government made clear that not every case went forward and many were being resolved. Indeed, in light of the Court's statement that it wanted to "commend the government for working so quickly in trying to resolve these cases," the OIG's assertion that litigating some cases while resolving others was improper appears at odds with the view of the court with jurisdiction. Moreover, it is at odds with common sense. This is another example of the OIG substituting its own judgment for the reasoned approach of the court, the Department of Justice, and scores of other officials. In addition, the conclusion is at odds with the facts.

A good number of cases, in fact, did go forward after the *Washington* order, including *Mohammed* and two cases that reached the Supreme Court. It is also unclear what alternative action the OIG proposes. Does the OIG mean to suggest that the Government should have refused to settle any of the cases that challenged the application of the Executive Order? We do not know, because this is another example of imprecise criticism without any explanation of what actions the OIG believes CBP should have taken in these circumstances. It seems equally untenable to contend that every individual who arguably fell within the scope of the Executive Order should have been permitted to travel to the United States, the application of the Executive Order waived with respect to the individual, and the individual admitted to the country. Even setting aside the operational problems inherent in such an approach, it is not clear how that approach would have been consistent with the law.

The Report also opines that the intent of the *Aziz* court was to require physical access to secondary inspection areas for lawyers in response to the court's order of January 28, 2017. The question of physical access was one of the issues actually argued in a hearing before the court on February 3, 2017. Indeed, the plaintiffs explicitly asked the court to "make clear that the requirement to permit access to lawyers means in person access." With respect to the question of physical access, the court expressed skepticism. The court also explained its reluctance to rule further on the motion to show cause because the court did not "think it furthers the goal of trying to get these issues resolved by pushing for contempt citations at this point." The court listened to the parties' arguments arguing for a subsequent order and declined to do so or to rule on the motion to show cause, which would have been the first step towards a determination of noncompliance with its order. The court explained that "I am encouraged by the attitude of the government that they're trying to resolve these cases, and I don't want to stir up the waters unnecessarily." Indeed, at the close of the *Aziz* hearing, counsel for Virginia explicitly requested that the court modify the terms of the injunction to require in-person access to counsel for LPRs in secondary. The court specifically declined to do so, noting that "I don't think counsel are permitted into the secondary area," and that the "issue is somewhat less pressing than it was on Saturday because at this point, I don't think folks are coming to the airport who would be covered by this." The Report points to no facts that were unavailable to the court at the time of that hearing. It is accordingly unclear how the OIG could be in a better position to find a failure to comply than the court itself. This is particularly true where, as here, these arguments were put squarely to the court, and the court declined to adopt them. The transcripts of these hearings are, of course, available to the public.

Finally of note, the Report questions the underlying value of the Executive Order generally, observing: “CBP did not detect a single instance of terrorist threat because of the [Executive Order].” This statement reflects a fundamental misunderstanding of the purpose for the Executive Order and the nature of the Department’s security measures. The President issued the Executive Order to enhance the screening and vetting protocols used to protect the homeland, and the temporary suspension of entry was designed to accomplish this in a manner that temporarily reduced the entry of individuals associated with countries presenting heightened threats or with programs for which screening and vetting were not sufficient.

The OIG does not recognize that it lacks the information necessary to know whether the suspension of entry prevented terrorists from entering the United States. Some security measures have the effect of deterring unlawful action (such as entry into the United States for terrorism-related purposes), but that effect is often not amenable to accounting in after-the-fact oversight. We know now that the screening and vetting standards have since been enhanced because of actions taken pursuant to this and other Executive Orders. And while the OIG might prefer for the President and the Department to have implemented the measures called for in a more deliberative manner, the Report fails to recognize the importance and legitimacy of expedient action when the President determines that threats to the United States warrant enhanced security measures.

Moreover, the OIG appears to hold CBP to two different and competing standards. On the one hand, the OIG implies that CBP should have ceased implementing activities under the Executive Order altogether. On the other hand, the Report faults CBP for not fully realizing the security benefits from implementing an Executive Order that, in effect, was never able to be fully implemented. Ultimately, however, *post hoc* debates about the efficacy of the Executive Order are beside the point in this context, as neither the OIG’s views nor the views of any Department official as to the wisdom of Executive Order 13,769 change or alter the Department’s legal duty to implement Executive Order 13,769, subject to applicable court orders.

The Department remains proud of the tremendous efforts of its officials at every organizational level during the exceptionally complex implementation of the Executive Order 13,769 the first week after its issuance. We are concerned that the Report does not recognize many of the extraordinary efforts of DHS and its officers during that time. Taking a closer and retrospective look at the Department’s actions during this period, an accurate account of these events would tell of thousands of individual stories of extraordinary dedication to upholding the law and to the rule of law in implementing a national security mission the week of January 27 to February 3, 2017. The Department of Homeland Security offers no apology for lawfully implementing the President’s and Congress’ mandates.

Again, thank you for the opportunity to review and comment on this Report. DHS requests that the OIG include this management response as an Appendix to the final Report when published. Under separate cover, the Department is providing the OIG with a redacted version of the Report. The Department has decided not to waive privileges, independently reviewed by the U.S. Attorney’s Office for the District of Columbia, associated with the redacted portions of the Report. Those portions may not be released or disclosed without obtaining prior approval from the Department. Please feel free to contact me if you have any questions.



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Appendix E

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